HEARING TO REVIEW THE IMPACT OF ENFORCEMENT ACTIVITIES BY THE DEPARTMENT OF LABOR ON SPECIALTY CROP GROWERS

HEARING

BEFORE THE

SUBCOMMITTEE ON HORTICULTURE, RESEARCH, BIOTECHNOLOGY, AND FOREIGN AGRICULTURE

OF THE

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SUBMITTED MATERIAL

HEARING TO REVIEW THE IMPACT OF ENFORCEMENT ACTIVITIES BY THE DEPARTMENT OF LABOR ON SPECIALTY CROP GROWERS

WEDNESDAY, JULY 30, 2014

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON HORTICULTURE, RESEARCH,
BIOTECHNOLOGY, AND FOREIGN AGRICULTURE,
COMMITTEE ON AGRICULTURE,
Washington, D.C.

The Subcommittee met, pursuant to call, at 10:01 a.m., in Room 1300, Longworth House Office Building, Hon. Austin Scott [Chairman of the Subcommittee] presiding.

Members present: Representatives Scott, Hartzler, Yoho, LaMalfa, Schrader, DelBene, Kuster, and Costa.

Staff present: John Goldberg, Josh Mathis, Kevin Kramp, Mary Nowak, Nicole Scott, Tamara Hinton, Keith Jones, and Liz Friedlander.

OPENING STATEMENT OF HON. AUSTIN SCOTT, A REPRESENTATIVE IN CONGRESS FROM GEORGIA

The CHAIRMAN. Good morning. This hearing of the Subcommittee on Horticulture, Research, Biotechnology, and Foreign Agriculture to review the impact of enforcement activities by the Department of Labor on specialty crop growers, will come to order.

I am going to read an opening statement followed by my colleague Mr. Schrader, from Oregon. And again, I would like to thank you all for being here today to discuss an issue that has become an increasingly difficult challenge for farmers in their day-to-day operations. The purpose of today's hearing, of the Subcommittee on Horticulture, Research, Biotechnology, and Foreign Agriculture, is to address the growing concern of the Department of Labor's use of the so-called hot goods provision under the Fair Labor Standards Act of 1938.

The original purpose of this provision which, again, was written in 1938 was to protect workers from poor working conditions and negligible employers. Let me be clear, neither I nor anyone else on this Committee condones violations in regard to the Fair Labor Standards Act in any way. We believe it is important to provide fair wages for agricultural workers yet this law was not intended for use with regards to fresh fruits and vegetables which perish more easily than a manufactured good.

That said, we are aware of multiple and effective tools that the Department of Labor can use without having to resort to their discretionary authority under the hot goods provision. To be clear, the Labor Department has authority to compel specialty crop producers and packers to reimburse workers when wages fall short of the minimum wage requirement without using the hot goods provision.

This issue that we will discuss today is the Department of Labor's abuse of this discretion when applying hot goods provision to perishable agricultural commodities. In these cases, producers are not only liable for civil fines and back wages to workers, but the fines and penalties pale in comparison to the economic damages brought about by the Department of Labor's destruction of their crops.

The Department does not set fire to these crops, but they do create a scenario under which the crops would naturally perish. The Department relayed to us that they used this provision sparingly in the past. What they have failed to acknowledge is the inexcusable use of a tool which Congress never granted or intended; that is, the tool of fear, and intimidation.

The Department has used this fear far too often to extort concessions from producers with little, if any, proof of wrongdoing. This Committee recognizes the importance, "to assure work-related benefits and rights" as the Department's mission statement refers. I hope we all would agree that these rights are not only established in law, but in the fabric of the rights guaranteed to us in our Constitution.

The Department's actions are so intrusive that they threaten the ability of employees to enjoy these rights by extorting employers into bankruptcy and closure. We fear that this is the direction the Department is pursuing regarding berry producers in the Pacific Northwest. In at least one of these cases, the producer courageously chose to fight this rogue agency, and prevailed in Federal Court against the Department, where the Department of Labor was found to have forced the producer to admit guilt under duress.

We find ourselves in a situation where the Department is attempting to intimidate this producer by using what it believes to be the apparently inexhaustible supply of taxpayer funds to bankrupt this producer through a seemingly endless appeals process in the courts. And what has not been adjudicated is the original claim by the Department of Labor that the producer had more than 1,300 so-called ghost workers who never received compensation. Thirteen hundred workers would be like having the entire high school, where I graduated, in the field.

Where did this claim come from? What proof does the Department have? How many of these ghost workers have come forward? By last count a mere 72 have come forward. Rather than acknowledge the arbitrary nature of the Department of Labor's accusations regarding this farmer, this rogue agency will instead argue that the problem is with the workers and the farmers and not their methodology. I think it is clear that the problem is with the agency. Although this case is specific to a certain region, the Committee is convinced that without proper examination of the Department of Labor's actions the pervasive nature of these actions will begin to affect farmers nationwide. In fact, in my state, in Georgia, pro-

ducers have reported to my office that although a hot goods order has not been used, it has been threatened several times.

In examining the inexcusable nature of the Department's actions and the arbitrary nature of its evaluation methods, I hope that we can gain a greater understanding of this escalating threat and the avenues for remedy.

Before us today are two witnesses. Dr. David Weil is the Administrator of the Wage an Hour Division of the U.S. Department of Labor and Mr. Brad Avakian, is the Commissioner of the Oregon Bureau of Labor and Industries. Gentlemen, we look forward to both of your testimony.

[The prepared statement of Mr. Scott follows:]

PREPARED STATEMENT OF HON. AUSTIN SCOTT, A REPRESENTATIVE IN CONGRESS FROM GEORGIA

Good morning.

Thank you all for being here today to discuss an issue that has become an increasingly difficult challenge for farmers in their day-to-day operations.

The purpose of today's hearing of the Subcommittee on Horticulture, Research, Biotechnology, and Foreign Agriculture is to address the growing concern of the Department of Labor's (DOL) use of the so-called "Hot Goods" Provision under the Fair Labor Standards Act of 1938 (FLSA).

The original purpose of this provision, which again was written in 1938, was to protect workers from poor working conditions and negligible employers. Let me be clear, neither I nor anyone else on this Committee condones violations in regards to FLSA, in any way. We believe it is important to provide fair wages for agricultural workers. Yet, this law was not intended for use with regards to fresh fruits and vegetables, which perish more easily than a manufactured good. That said, we are aware of multiple and effective tools the Department of Labor can use without having to resort to their discretionary authority under the "hot goods" provision. To be clear, the Labor Department has authority to compel specialty crop producers and packers to reimburse workers when wages fall short of the minimum wage requirement WITHOUT using the hot goods provision. The issue we will discuss today is the Department of Labor's abuse of this discretion when applying the hot goods provision to perishable agricultural commodities. In these cases, producers are not only liable for civil fines and back wages to workers, but the fines and penalties pale in comparison to the economic damages brought about by the Department of Labor destroying their crops. The Department does not set fire to these crops. They just create a scenario where the crops naturally perish.

The Department relayed to us that they used this provision sparingly in the past. What they have failed to acknowledge is the inexcusable use of a tool which Congress has never granted or intended—the tool of fear and intimidation. The Department has used this tool far too often to extort concessions from producers with little if any proof of wrong doing.

This Committee recognizes the importance, "to assure work-related benefits and rights" as the Department's mission statement refers. I hope we all would agree that these rights are not only established in law but in the fabric of the rights guaranteed to us in our Constitution. Yet, the Department's actions are so intrusive they threaten the ability of employees to enjoy these rights by extorting employers into bankruptcy and closure. We fear that this is the direction the Department is pursuing regarding berry producers in the Pacific Northwest. In at least one of these cases, the producer courageously chose to fight this rogue agency and prevailed in Federal court against the Department, where the Department of Labor was found to have forced the producer to admit guilt under duress. Now we find ourselves in a situation where the Department is attempting to intimidate this producer by using what it believes to be the apparently inexhaustible supply of taxpayer dollars to bankrupt this producer through a seemingly endless appeals process.

Yet, what has not yet been adjudicated is the original claim by the Department of Labor that the producer had more than 1,300 "ghost workers" who never received compensation. Thirteen hundred workers would be like having the entire high school where I graduated in the field. Where did this claim come from? What proof does the Department have? How many of these "ghost workers" have come forward? By last count, a mere 72 "ghost workers" have come forward. Rather than acknowledge the arbitrary nature of the Department of Labor's accusations regarding this

farmer, this rogue agency will instead argue that the problem is with the workers and the farmers and not with their methodology. I think it is clear that the problem is with the agency.

Although this case is specific to a certain region, the Committee is convinced that without proper examination of the Department of Labor's actions, the pervasive nature of these actions will begin to affect farmers nationwide. In fact, in my state of Georgia, producers have reported to my office that all though a "hot goods" order has not been used, it has been threatened several times.

By examining the inexcusable nature of the Department's actions and the arbitrary nature of its evaluation methods, I hope we can gain a greater understanding of this escalating threat and the avenues for remedy.

Before us today are two witnesses.

Dr. David Weil is the Administrator of the Wage and Hour Division of the U.S. Department of Labor and Mr. Brad Avakian is the Commissioner for the Oregon Bureau of Labor and Industries. Gentlemen, we look forward to both your testimony. I know recognize my colleague, Mr. Schrader for any opening comments he may have.

The CHAIRMAN. I now recognize my colleague, Mr. Schrader, for any opening statement he may have.

STATEMENT OF HON. KURT SCHRADER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. SCHRADER. Thank you, Chairman Scott, I appreciate having this hearing today. I think it is extremely important.

I want to thank Dr. Weil and Commissioner Avakian for coming before the Committee so we hopefully can better understand these enforcement actions that have occurred on our Oregon farms.

The Department of Labor has, frankly, continued to use, as you outlined, this hot goods provision despite the fact that a Federal Court has determined that this action in perishable products on farms is coercive in nature. That conclusion is very troubling to me, and should be troubling to everyone here. It is the reason we are taking the actions today.

I want to provide some background, and context for today's hearing. Originally passed as a part of the New Deal, as Chairman Scott alluded, the Fair Labor Standards Act was intended to protect American workers and to stimulate the economy. The FLSA established the Department of Labor's Wage and Hour Division to ensure that workers are fairly compensated for their labor and to prevent the scourge of child labor. The FLSA continues to play an important role in protecting American workers and children from unscrupulous workplace practices, as it should. Illegally employing children or not fully compensating workers for their labor, is not condoned by anybody.

However, my support for the FLSA should not be construed to represent any support of the recent actions taken by the Department of Labor. In the summer of 2012, the Department of Labor used a provision within the FLSA, the so-called hot goods provision, to quarantine and confiscate Oregon farmers' perishable products, thereby imperiling and threatening their very livelihood. In taking the actions it did, DOL ignored its own historical precedent, violated Constitutionally protected due process, and subjected family farms to crushing economic harm in these very tough times.

Since the summer of 2012, I have been working diligently with Members of the Oregon Delegation and this Committee, to gather data from DOL on these enforcement actions and the utilization of the hot goods provision as a tool against agricultural Wage and

Hour violations. I can firmly say over the last 2 years, I have been severely disappointed.

Let me give you one example: The Department of Labor has repeatedly told my office that comprehensive data on the historical use of the hot goods provisions is unavailable. Yet, the Congressional Research Service, found very quickly and very clearly that the first such application of hot goods authority to perishable agricultural products occurred in the last few years since 2008. That is 70 years, folks, 70 years. It has also become crystal clear to me that the Department of Labor has been goaded by outside special interest groups in the last few years to use this hot goods authority without any regard to the unique application in the agricultural sector.

Furthermore, the actions taken in Oregon were done with complete disregard to Constitutionally protected due process under the 5th and 14th Amendments. Historically, Department of Labor investigations and its process for adjudicating violations of Fair Labor Standards usually followed a couple of key principles. First, when all of the fact finding steps were completed, the employer or the employer's representative will be told whether violations have occurred and if so, what the violations are, and how to correct them. If back wages are owed, the employer will be asked to pay the back wages. Only in the absence of an employer voluntarily doing so, did the Wage and Hour Division seek to restrain the shipment of goods.

This Department of Labor policy clearly understands that employers should be given the opportunity to work with the DOL inspectors to correct the violations and pay back wages before the threat of a hot goods objection. Application of the hot goods provision, however, has different impacts in different sectors. The Chairman alluded to that. Textiles, durable goods, even processed or frozen foods can sit idle in the supply chain for weeks or months on end without having their market values compromised. The same simply cannot be said for blueberries or other perishable ag commodities, the value of which can seriously decline in a matter of days.

In the case of one of my constituents, in addition to the almost $170,000 in fines and alleged back wages paid directly to the Department of Labor, he lost another $90,000 in revenue based on rotting berries during the imposition of the hot goods objection. When improperly used in the perishable ag sector, the threat of hot goods objection becomes coercive. As millions of dollars of blueberries sat idle in this supply chain, my constituents were forced to make a business decision: Meet the Department of Labor demands, sign a consent judgment, waive their rights to contest the allegations, pay substantial fines, or lose their crops and potentially their farm.

As the Department of Labor continues to defend this coercive action, it is important for everyone in the room to understand that all of this was done before the farmers were even informed about the specific charges they faced. That is just not right. The consent judgments that my constituents ultimately signed to remedy the alleged violations did not include any administrative review process, as I outlined before. These farmers had never even previously been

cited for Wage and Hour violation before the Department of Labor jumped to its drastic and draconian action. But, when I had talked to the DOL staff in Washington, D.C., I was assured that it was only used as a last resort, and only on repeat offenders.

Obviously, the Department did not follow its own policies. Fortunately, two of these farmers decided to fight this case in court. I am going to read a section here, with the chair's permission, on what the court found:

> "While the defendants were aware of the coercive nature utilized by the DOL [Department of Labor] at the time the consent judgments were entered, the nature of their operations combined with DOL's [Department of Labor's] departure from its previous course of conduct in using the hot goods objection with respect to perishable goods complicated defendants' analysis of how to proceed in challenging the DOL [Department of Labor] and the judgments it obtained.
>
> "The DOL [Department of Labor] had previously allowed an alleged violator to place the proposed back wages and penalty into escrow to allow the hot goods objection to be lifted while the violations were litigated. However, the defendants were caught off guard in these cases when the DOL [Department of Labor] changed its tactics and insisted on a consent decree before lifting the objections. While the proposed back wages and penalty were substantial, the potential losses due to a continuing hot goods objection pending litigation dwarfed the proposed judgments' impact on defendants. The defendants, as discussed below, were left with no choice but to accept the judgments. Moreover, given the DOL's [Department of Labor's] new posture it is not inconceivable that mounting an attack on the judgment, without further information, could have had uncertain repercussions for the defendants in any future interactions with the DOL [Department of Labor] in view of its more aggressive tactics. . . .
>
> "It could be argued, as suggested above, that defendants could have sought a TRO [temporary restraining order] to lift the hot goods objections and permit review ofthe DOL's [Department of Labor's] assessment. . . .
>
> "However, the DOL's [Department of Labor's] imposition of the hot goods objection to highly perishable goods and requirement of immediate admission of defeat without any recourse to the courts unfairly stacked the deck against the Ditchens and Pan-American. Given the nature of the business in which defendants engaged, it is not difficult to understand why they would conclude that resort to such options without further information would be extremely risky given the potential staggering economic losses. Moreover, this court can think of no good reason in support of the DOL's decision to refuse the accommodation of having defendants place the penalties and wages at issue in escrow as a condition of lifting the hot goods objection pending administrative and court review. Given the economic duress placed upon defendants in order to secure the consent judgments, the judgments should be vacated . . ."

That is pretty strong condemnation language by the court. To me, the Department of Labor is overzealous, and its inappropriate use, in my opinion, of this hot goods authority on Oregon farmers was completely uncalled for. It has led Chairman Scott and I to introduce H.R. 1387 that clarifies the law on this issue. This simple piece of legislation states that the Department of Labor can continue to use hot goods objection on any product other than perishable agricultural commodities. That is very consistent, I believe, with the original law and its intent.

If the Department of Labor continues it inappropriate use of the hot goods provision, farmers' livelihoods are going to be seriously jeopardized across this country. To say I remain troubled regarding how the Department of Labor has pursued the hot goods provision, and its lack of cooperation as we have tried to get a better understanding of the "whys" and "hows" is an understatement.

The Department of Labor, as I have said, did not follow any appropriate process as set out by its own rules. They used faulty methodology in coming to its findings. They coerced farmers into forfeiting their rights by threatening their very livelihoods. They have denied American farmers, my fellow Oregonians, the very due process our Forefathers built our country on, and undermined their faith in their government. That is a sad commentary on the agency's performance.

I yield back, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Schrader.

The chair would request that Members submit any opening statements that they may have for the record so that the witnesses may begin their testimony and assure there is ample time for questions. I do expect us to have at least two rounds of questions today.

I would like to welcome our panel of witnesses to the table. We have two witnesses today, the first is Dr. David Weil, and the second is Mr. Brad Avakian.

Dr. Weil, please begin when you are ready.

STATEMENT OF DAVID WEIL, PH.D., ADMINISTRATOR, WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR, WASHINGTON, D.C.

Dr. WEIL. Thank you, and good morning, Chairman Scott, Ranking Member Schrader, and Members of the Subcommittee.

Thank you for the invitation to testify at this hearing on the Fair Labor Standards Act's hot goods provision, an important tool that we use carefully and appropriately.

Mr. Chairman, I want to assure you that the Department of Labor and its Wage and Hour Division that I proudly lead recognize the importance of the U.S. agricultural industry and the critical role it plays in not only putting food on our tables, but also creating jobs and helping our economy to prosper. The Wage and Hour Division's work is critical to ensuring a level playing field for the vast majority of businesses who play by the rules and in protecting the rights and working conditions of agricultural workers.

All told, between Fiscal Year 2009 and 2013, Wage and Hour concluded nearly 7,500 agricultural investigations, collecting more than $20 million in back wages for more than 46,600 agricultural workers. The FLSA was born during a time of great economic suf-

fering when the Great Depression touched every corner of this nation. Congress included in the Act language commonly referred to as the hot goods provision, the basic purpose of which is to exclude from interstate commerce goods produced in violation of the statute's minimum wage, overtime, and child labor provisions.

In encouraging Congress to adopt the hot goods provision, President Roosevelt outlined its objectives stating, "So to protect the fundamental interests of free labor and free people, goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade."

Congress crafted the hot goods provision to apply expansively to all goods. Courts have upheld our use of this provision many times in the context of preventing the illegal shipment of tainted goods in agriculture, garment, and many other industries. We know that the majority of employers are doing right by their workers and the law, but we continue to find violations impacting the wages and working conditions of some of our country's most vulnerable workers. In a majority of cases, Wage and Hour is able to reach a resolution with employers by working together. Occasionally, we do uncover labor violations that necessitate the use of the hot goods provision in order to obtain remedies for the affected workers, and protect the stream of commerce and responsible producers.

The hot goods provision is only one of several tools available to Wage and Hour and while not a tool we use frequently, it has been an important part of our enforcement program since the Fair Labor Standards Act was enacted. We also know that the provision is a strong tool and accordingly, we have created careful procedures regarding when and how to use it. But it is also important to understand that we use our enforcement tools in conjunction with other methods of increasing compliance. Wage and Hour continues to recognize that enforcement alone will never be sufficient to achieve the agency's mission.

Education and outreach to the employer community to provide and promote voluntary compliance has been and will continue to be one of our key strategies for promoting sustained and industry-wide compliance. This has been particularly important in the agricultural context where since Fiscal Year 2009 Wage and Hour has conducted nearly 600 outreach events and presentations that were specifically geared to providing valuable information and compliance assistance to the agricultural industry.

I want to briefly share a success story that illustrates this integrated approach. Wage and Hour began investigations in New Jersey, North Carolina, and Michigan during the 2009 harvest season and uncovered systemic labor violations among blueberries growers and farm labor contractors, including the illegal employment of children. In addition to recovering several thousand dollars in back wages and assessing penalties, Wage and Hour undertook a comprehensive approach to ending these practices.

Before the 2010 harvest was to begin, our offices in these three states took proactive steps to ensure compliance with agricultural standards by conducting outreach to employers. We met with farmers, farm labor contractors, and industry associations to provide them with meaningful compliance assistance. The following year

employers took important steps to ensure that children were not working in the fields. No child labor violations were found in the subsequent year in North Carolina, and New Jersey, and only one farm in Michigan had those violations.

This is truly a win/win for everybody, and a great example of how our efforts are aimed at helping farms and farm workers prosper together. In enacting the Fair Labor Standards Act, Congress acknowledged the inherent competitive nature of the market, and recognized that without strong enforcement mechanisms, workers and employers would fall victims to ills of unfair competition and exploitive labor practices.

When deployed carefully and in concert with other tools of outreach and enforcement, I strongly believe we can achieve the statutory objectives entrusted to me of providing a fair day's pay, for a fair day's work.

Thank you again for the opportunity to testify today, and I am happy to answer your questions.

[The prepared statement of Dr. Weil follows:]

PREPARED STATEMENT OF DAVID WEIL, PH.D., ADMINISTRATOR, WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR, WASHINGTON, D.C.

Good morning, Chairman Scott, Ranking Member Schrader, and Members of the Subcommittee. Thank you for the invitation to testify at this hearing on the Fair Labor Standards Act's (FLSA) "hot goods" provision, a statutory enforcement tool and safeguard of critical importance to our nation's workers, businesses and economy. It is an important tool that we use carefully and appropriately. Courts have upheld our use of this provision many times in the context of preventing the illegal shipment of tainted goods in many industries including agriculture, garment, and other manufacturing, among others.

Mr. Chairman, the Department of Labor recognizes the importance of the U.S. agricultural industry and the critical role it plays in not only putting food on our tables but also creating jobs and helping our nation's economy prosper.

I am pleased to be here today to talk with you about the Wage and Hour Division's work in protecting the rights of agricultural workers and ensuring a level playing field for the vast majority of this industry's businesses who play by the rules.

Background

The Fair Labor Standards Act of 1938 was born during a time of great economic suffering, when the Great Depression touched every corner of this nation. In response to those circumstances, Congress recognized the critical need to establish a floor of basic labor protections, including setting minimum wage, overtime compensation, and child labor protections for America's workers, and also the need to level the competitive playing field for employers.

The passage of this law was an unprecedented development—one that recognized that the establishment and enforcement of basic labor standards are necessary for promoting the economic security of workers and their families and for ensuring the integrity of our economy.

To advance the critical mission of the FLSA, Congress included in the Act an explicit prohibition against the shipment and distribution in commerce of goods that were produced in violation of the FLSA's minimum wage, overtime or child labor requirements.

Commonly referred to as the "hot goods" provision of the FLSA, § 15(a)(1), the basic purpose of the § 15(a)(1) prohibition, as the Supreme Court has pointed out, is to exclude from interstate commerce goods produced under substandard labor conditions, which would compete unfairly with goods produced by complying employers, and which in their total effect might force complying employers out of business.

In his 1937 message to Congress, President Roosevelt urged Congress to enact the FLSA and include in the bill the rules and legal prohibitions necessary to accomplish the objectives of the Act. More specifically, President Roosevelt's message identified the needs and objectives of the hot goods prohibition: "And so to protect the fundamental interests of free labor and a free people we propose that only goods

which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce. Goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade."

President Roosevelt's message is cited approvingly throughout the legislative history of the FLSA and served as strong inspiration for passage of the Act.

Prohibiting the shipment of goods produced in violation of the FLSA serves several fundamental statutory purposes. In addition to ensuring that employers who violate the FLSA do not enjoy an unfair competitive advantage over their law-abiding peers, the hot goods provision serves to incentivize employers to adhere to the FLSA's requirements. The hot goods provision also serves to protect the interests of those workers who have suffered substandard working conditions during the production of such goods.

It is also important to point out that Congress crafted the hot goods provision to apply expansively to *all* goods for the purpose of removing those tainted goods from the stream of interstate commerce. There is no statutory exception for agricultural or perishable goods to the hot goods provision. In fact, in today's economy, most goods can be considered perishable if you consider the tremendous pressure upper-tier businesses place on lower-tier suppliers to deliver goods on a precise schedule. Be they blueberries, automobile parts, high fashion clothing items, or consumer digital products, delay in delivery date can be extremely costly to all parties in the supply chain.

Wage and Hour Efforts

The FLSA's passage in 1938 marked the creation of the agency I am honored to lead, the Wage and Hour Division (WHD), whose mission is to *promote and achieve compliance with labor standards to protect and enhance the welfare of the nation's workforce.* That is, we are charged with ensuring that working people receive a fair day's pay for a fair day's work.

This is a critical directive in the agricultural industry where, for more than 76 years WHD has been working hard to strengthen compliance with Federal labor laws. We know that the majority of employers in this industry are doing right by their workers and the law, but we continue to find labor violations impacting the wages and working conditions of some of our country's lowest-paid workers who, due to a lack of knowledge of the law or a fear of exercising their rights, are vulnerable to disparate treatment and labor violations.

The agricultural industry is the backbone of our economy, which is supported by growers, farm labor contractors and other businesses. The value of our nation's farms cannot be overstated, and it is in all of our interests to ensure that farmers and workers prosper together. That's where we come in—our job at the Wage and Hour Division is to ensure that agricultural employers keep their workers safe on the job, house them in safe and sanitary residential facilities, and pay them their legally required wages. We are also committed to protecting the interests of law-abiding employers and ensuring that they are not placed at a competitive disadvantage by businesses that break the law.

As a law enforcement agency, we take seriously our responsibilities to ensure compliance with the law. WHD conducts thorough inspections of migrant housing units, transportation vehicles, employment practices and pay records to ensure compliance with all applicable agricultural labor standards. These enforcement efforts also include timely compliance assistance where, for example, our investigators reach out to agricultural employers in advance of their growing or harvest season to remind them of their legal responsibilities and help them ensure compliance throughout the season.

During investigations, our investigators go to great lengths to gather accurate and sufficient evidence of an employer's level of compliance with all applicable laws. And when violations are found, WHD investigators work expeditiously with the employers to identify solutions and methods for coming into compliance. We also devote time and resources to educating employers about their responsibilities to help them prevent future labor violations from occurring.

However, employers who refuse to comply with the law may face appropriate action based on what we find. By conducting effective investigations and using a variety of enforcement tools—including civil money penalties, liquidated damages, injunctions, and other appropriate remedies—WHD is able to bring employers into compliance and deter future labor violations, thereby safeguarding the rights and welfare of agricultural workers.

In a majority of agricultural cases, WHD is able to reach a resolution with employers and we often work together to remedy the problems. Occasionally, however, we uncover labor violations that necessitate the use of enforcement tools like the

hot goods provision of the FLSA, in order to obtain remedies for the affected workers and protect the stream of commerce from being adversely affected by illegally produced goods and to make sure that responsible producers in the agriculture supply chain are not put at a competitive disadvantage by producers who flout the law.

The hot goods provision is one of several tools in WHD's enforcement toolbox. And, while not a tool we use frequently, the hot goods provision has been an important part of our enforcement program since the FLSA was enacted.

In fact, one of our earliest hot goods enforcement actions occurred in 1946 when the Department obtained injunctions from Federal court to restrain vegetable packers in Mississippi from shipping their goods in interstate commerce because the vegetable products were processed and packed by minors, many under 14 years of age, in violation of the FLSA's child labor provisions.

In more recent years, WHD has utilized hot goods actions in numerous agricultural sectors all across this country:

- In the 1980's for example, WHD brought hot goods actions against sweet potato growers in North Carolina to obtain back wages and compliance agreements from the employers.
- In 1990's, WHD utilized the hot goods provision to obtain compliance in several cases involving child labor violations. For example, WHD sought court action against onion growers in Texas and strawberry growers in Louisiana, who employed children, ages 6 to 11, to pick crops, in violation of the FLSA. The employers were prevented from shipping the "hot" goods until our enforcement matters were resolved. As a result, they agreed to comply in the future, paid civil money penalties and also signed compliance monitoring agreements with WHD.
- To give a more recent example, earlier this year WHD recovered $428,000 in back wages and damages for low-wage workers on a Hawaiian basil farm. After uncovering egregious minimum wage and overtime violations, the agency requested the employer to voluntarily refrain from shipping the basil harvested in substandard conditions to off-island customers. The agency agreed to shipment and released its objection once the employer agreed to come into immediate compliance and started paying the back wages due on behalf of the affected workers.

These are just a few examples of our decades-long commitment to strengthening compliance in the agricultural industry through the use of the hot goods provision of the FLSA.

Beyond the use of a particular statutory tool, WHD has become more strategic in its efforts to strengthen labor law compliance in the agricultural industry and keep workers safe while on the job.

WHD offices conduct strategic initiatives in industries across the country. These initiatives include directed investigations of employers throughout the supply chain, as well as compliance evaluations that inform the agency of the severity and likely causes of violations. Our initiatives also heavily focus on reaching out to employers, industry associations, and worker advocates to engage them in dialogue and identify strategies for addressing industry-specific problems.

This multi-pronged approach to ensuring compliance is working—our strategic efforts are helping maximize WHD' impact and the results of all these efforts speak volumes in the agricultural industry.

Between FY 2009 and FY2013, WHD concluded nearly 7,500 agricultural investigations, collecting more than $20 million in back wages for more than 40,000 workers nationwide.

These are big numbers but please allow me to underscore the gravity of what they represent. These are real dollars and cents that were earned through the labor of real people—many of whom are your constituents and are also vulnerable low-wage workers. It is real money that has enabled them to put food on the table, pay the rent, care for their children, keep the lights on, and pay for other expenses.

Furthermore, putting rightfully earned wages back into the pockets of working people means that they will turn around and spend it on goods and services, stimulating our economy and helping to create new jobs.

These numbers also represent our success in making sure that law-abiding employers are not placed at a competitive disadvantage against businesses that break the law. Robust and consistent enforcement of the law is critical to leveling the playing field, creating the right incentives and making those who comply with workplace laws stronger, not weaker, in the marketplace.

I would like to share with you a real success story that has made a difference in the lives of hardworking people and serves as a great example of our strategic enforcement efforts in action.

- A few years ago, WHD implemented one of the most effective, creative, and visible farm labor enforcement programs in the history of the agency, focusing on agricultural industries in NJ, NC and MI during their blueberry harvest seasons.
- Investigations conducted during the 2009 harvest season uncovered egregious labor violations among blueberry growers and farm labor contractors (FLCs) in the three states—including the illegal employment of children in several fields. Other violations included unsafe housing conditions, transporting workers in uninsured vehicles, failing to pay the minimum wage, failing to properly disclose terms and conditions of employment, failing to comply with farm labor contractor registration requirements, and failing to keep all required records. In addition to recovering several thousand dollars in back wages and assessing penalties, WHD took a comprehensive approach to ending the dangerous practices it had uncovered.
- In early 2010, before the blueberry harvest was to begin, WHD offices in the three states took proactive steps to ensure compliance with agricultural labor standards, particularly in regard to child labor. WHD offices conducted outreach and education (in English, Spanish and Haitian-Creole) to inform employers of their legal responsibilities and ensure workers understood their rights. WHD also met with farmers, FLCs, community organizations, state and local agencies, and industry associations—including the NJ Farm Bureau and the NC Blueberry Council—to speak with them about our enforcement efforts and to provide them with meaningful compliance assistance.
- As a result of WHD's enforcement and compliance assistance efforts, employers took observable and important steps to ensure that children were not working in the fields. No child labor violations were found at the farms investigated in NC and NJ, and only one farm in MI was found in violation of Federal child labor requirements. This is truly a win-win for everybody and a great example of how WHD's efforts are aimed at helping farms and farm workers prosper together. This story also reflects the commitment my staff has to providing employers with the tools they needed to ensure their business practices are in compliance with the law.

Compliance Assistance

WHD has long maintained that enforcement alone will never be sufficient to achieve the agency's mission of protecting our nation's workers. Education and outreach to the employer community to promote voluntary compliance has been and will continue to be one of our key strategies for promoting sustained and industry-wide compliance with Federal wage and hour laws.

We are equally committed to reaching out to agricultural workers and their representatives to inform them of their rights and to encourage them to contact us if they believe their rights have been violated.

The common theme here is *awareness.* We believe that workers who are *aware* of their rights and employers who are *aware* of their legal responsibilities (and the consequences of breaking the law) are better positioned than we are, in many instances, to identify and remedy labor violations, or to prevent them from occurring in the first place.

In furtherance of our goal to increase awareness, the agency has hired Community Outreach and Resource Planning Specialists (CORPS) to work in WHD District Offices across the country. These officers establish and maintain lines of communication at the local level; engage partners in dialogue about local industry practices and labor concerns; provide training and resources to stakeholders on wage and hour laws; and provide WHD with recommendations on how to better serve the needs of workers and regulated communities.

With the addition of these dedicated CORPS, WHD has increased its outreach and education efforts to inform employers, employees and other stakeholders about Federal wage and hour laws and to engage their participation in promoting industry-wide compliance.

This has been particularly important in the agricultural context where, *since FY 2009, WHD has conducted nearly 600 outreach events and presentations nationwide that were specifically geared to providing valuable information and compliance assistance to the agricultural industry.*

WHD also regularly engages community organizations, industry associations, employer representatives and other stakeholders in dialogue about compliance-related

matters. These stakeholder relationships are multidimensional—it is not just us talking to them about the importance of compliance or asking for their participation in outreach activities, we are also asking our partners about how we can improve our services and better serve workers and the regulated community.

For example, WHD collaborates with Farm Bureaus, Growers' Associations, and other industry representatives to solicit feedback and input when developing educational and outreach materials. These stakeholders' opinions help to inform the content of the final products and help WHD remain focused on the topics most relevant to the intended audiences.

This is the case with our newly developed compliance assistance materials, which we created in direct response to feedback received from agricultural employer groups and other industry stakeholders.

- We just released a new booklet that provides employers with simplified and consolidated information on the applicable statues and requirements governing agricultural employment. The information is presented in easy-to-understand language and is broken down into components that employers may quickly reference as needed. Separate segments cover topics including wages, housing, transportation, and field sanitation.
- This booklet is accompanied by a 10 minute video tutorial that walks agricultural employers through compliance requirements under the applicable laws, and provides real world examples of compliant and non-compliant employment conditions and practices.
- We have also released a revised informational pocket card for agricultural workers. The card will more clearly inform workers of their rights and provide them information on how to file a complaint with WHD if they believe their rights have been violated.

We are very proud of these new compliance assistance materials because they represent the benefits and success of stakeholder cooperation and dialogue. These new resources will be valuable additions to WHD's robust library of compliance assistance materials, and will be distributed widely through our ongoing outreach efforts and events.

Conclusion

Congress enacted the Fair Labor Standards Act of 1938 at a very dark time in our nation's history—a time where those fortunate enough to find employment were often exploited and had little available recourse for their grievances. And Congress, in its wisdom and knowledge of the inherent competitive nature of the market, recognized that without strong enforcement mechanisms—such as the hot goods provision—workers as well as responsible employers would fall victim to the ills of unfair competition and exploitive labor practices.

I am proud to be leading an agency with such a critical mission in the 21st century economy. We will continue our focus on data-driven, evidence-based strategic enforcement efforts and will be engaging in even more education and outreach. The ultimate goal of all our strategic enforcement and compliance assistance efforts is to change employer behavior for the better—to discourage employers from cutting labor costs at the expense of workers' wages and working conditions, and to help move them towards positive, compliant business practices so that workers and employers can prosper together. Our hot goods enforcement actions are a small but important part of this overall mission. Our measure of success will be improving compliance levels in the agricultural industry, so that when we enter workplaces in the days, weeks, months and years ahead, we find fewer and fewer violations.

Thank you again for the opportunity to testify today. I am happy to answer your questions.

The CHAIRMAN. Thank you, Dr. Weil.

Mr. Avakian.

STATEMENT OF HON. BRAD AVAKIAN, COMMISSIONER, OREGON BUREAU OF LABOR AND INDUSTRIES, PORTLAND, OR

Mr. AVAKIAN. Mr. Chairman, Committee Members, thank you for inviting me today to discuss Oregon's perspective on the use of the hot goods provision in the investigations of perishable agricultural products.

My name is Brad Avakian and I serve as Oregon's Commissioner of Labor and Industries, which in our state is a state-wide, non-partisan, elected position. Our agency supports our local industries with technical assistance. We train much of Oregon's workforce, and we enforce the state's civil rights laws in housing, public accommodations, and employment. We also enforce the state's Wage and Hour laws making sure that workers get paid the wages that they have rightfully earned. As a part of that, we license all of the state's farm labor contractors, and we manage the state's farm labor unit.

We have used strong wage enforcement, as a matter of basic fairness, not only for the workers, but also to make sure that the vast majority of the employers that do play by the rules enjoy a level playing field on which to compete. We conduct about 2,000 wage investigations a year, and in addition to that, we field about 20,000 calls a year from Oregon businesses seeking help navigating their way through complicated state and Federal laws.

Our timber, agricultural, and nursery industries play a critical economic role in our communities. They employ over 54,000 workers. We need strong wage enforcement, but we also must ensure due process for Oregon growers and it is for this reason, we have deep concerns about the use of the hot goods provision with perishable agricultural goods on our farms.

The imminent perishable nature of produce often renders contesting a hot goods motion moot. Because if the produce spoils, its value is converted to nothing. The farmer then has diminished or no ability at all to pay the employees' wages if wages are truly due. In fact, the actions of a farmer facing the choice of having their blueberries spoil in some warehouse during a protracted legal process on a hot goods motion, is far from voluntary when he or she is faced with signing a hot goods consent judgment.

This imbalance of power between the government and the accused in this kind of a hot goods action, we think obscures any meaningful due process, and in addition, risks violating Constitutional search and seizure, and commerce clause protections. In addition, requiring farmers to waive their rights of appeal, just runs contrary to basic rules of fairness.

Now, when applied appropriately, we do think that the hot goods provision is an effective tool in wage enforcement, but it should be limited to the enforcement of non-perishable items as originally intended and as those traditionally associated with industries like the garment industry.

The United States Department of Labor is our sister organization and I must say that we value our partnership with them very much. We work to stay in close communication so that we can both effectively coordinate our investigative resources. We believe in strong wage enforcement. We also believe that meaningful action against employers that fail to pay their wages can be taken without violating the fundamental principles of due process.

Mr. Chairman, I want to thank you again for your consideration of the issue, and for the Committee's interest in Oregon's perspective.

[The prepared statement of Mr. Avakian follows:]

PREPARED STATEMENT OF HON. BRAD AVAKIAN, COMMISSIONER, OREGON BUREAU OF LABOR AND INDUSTRIES, PORTLAND, OR

Mr. Chairman, Representatives:

Thank you for inviting me to discuss Oregon's perspective on the use of the "hot goods" provision of the Fair Labor Standards Act during the investigation of perishable agricultural products.

My name is Brad Avakian and I serve as Oregon's Commissioner of Labor and Industries, a non-partisan statewide elected position. Our agency supports local businesses with technical assistance, helps train much of Oregon's workforce, and enforces our state's civil rights laws so that people are treated fairly on the job, in housing and in public accommodations.

We also enforce the state's Wage and Hour laws, ensuring that workers receive the wages to which they're entitled. We license all the state's farm labor contractors and manage the state's farm labor unit. Last year, our enforcement efforts returned more than $2 million to Oregon workers who had not received the wages they had earned.

We view strong wage enforcement as a matter of basic fairness not only to the individual employees, but also the vast majority of employers who deserve a level playing field on which to compete. Our agency conducts more than 2,000 Wage and Hour investigations each year. In addition, we responded to about 20,000 calls last year from employers helping them to avoid potential wage violations in the first place.

In Oregon, our timber, agricultural and nursery industries play an important economic role in communities around the state. In fact, together, these sectors employ **over 54,000** workers—which is one of the reasons for our interest in enforcement that's both strong and fair.

Our agency is committed to having strong wage enforcement while still ensuring due process for Oregon growers. For this reason, we continue to have deep concerns about using the "hot goods" provision of the Fair Labor Standards Act with perishable agricultural goods on Oregon farms.

The imminent perishable nature of the produce often renders contesting a "hot goods" motion moot, for when the produce spoils, it has no value. With the loss of the goods, the farmer has diminished or no ability to pay employees if wages are truly due. In short, the actions of a farmer facing the choice of having blueberries spoil in a warehouse during a protracted legal process are far from voluntary when he or she signs a hot goods consent judgment.

The imbalance of power in this type of hot goods action obscures any meaningful due process during the enforcement action and risks violating Constitutional search and seizure and commerce clause protections. Requiring farmers to waive their rights of appeal—even if future findings of fact or law would exonerate the farmers—runs contrary to basic rules of fairness.

When applied appropriately, use of the "hot goods" provision can be a powerful and effective tool in wage enforcement. But "hot goods" should be limited to the enforcement of non-perishable items such as those traditionally associated with the garment industry.

We value our partnership with the U.S. Department of Labor and work to stay in close communication with them so that we can most effectively coordinate investigative resources. The Oregon Bureau of Labor and Industries believes in strong wage enforcement for our state's most vulnerable workers. We work to strengthen our workforce and believe that we can take meaningful action against employers failing to pay wages without violating fundamental principles of due process.

Thank you again for your consideration of this issue and the critical work of ensuring fair enforcement of important wage and hour protections.

The CHAIRMAN. Thank you, Mr. Avakian.

I have a couple of questions and I would like to remind Members that they will be recognized for questions in order of seniority for Members who were here at the start of the hearing. After that, Members will be recognized in order of arrival. I certainly appreciate Members' understanding of that. I now recognize myself for 5 minutes.

Dr. Weil, what is the budget for the Wage and Hour Division, the budget request for 2014?

Dr. WEIL. Thank you. I want to give you the precise number, $220 million, Mr. Chairman.

The CHAIRMAN. Okay, I show your request as $243 million, but that is fair enough. So you said that you have a $240 million budget. Do you pay your legal fees out of that budget, or are they paid out of the Department of Justice?

Dr. WEIL. I am pausing only because we have a solicitor's office that undertakes legal actions for the Wage and Hour Division as it does for other agencies which has its own budget, and they provide us legal assistance in all matters as they do for other agencies of the Department of Labor.

The CHAIRMAN. In other words, you have $¼ billion and there is another agency's pot that could also be dipped into when bringing these charges against a U.S. farmer?

Dr. WEIL. Well, we have resources to undertake our mission and our statutory obligations in regards to enforcement, voluntary compliance, and our other activities.

The CHAIRMAN. Where the farmer has to use their private money and their private assets to defend themselves. Let me read you a definition, if I could. "*Extortion* is the criminal offense of obtaining money, property, or services from a person, entity, or institution through coercion. *Coercion* is the practice of compelling a person or manipulating them to behave in an involuntary way whether through action or inaction by use of threats, intimidation, trickery, or some other form of pressure, force, or duress."

Dr. Weil, we have acknowledged that you have $¼ billion budget that is government funds. Certainly, the farmer has to pay for it out of their private funds. The U.S. District Court specifically said that your Department forced a farmer to sign, under duress, that they would not seek legal remedy in the court that is guaranteed by the United States Constitution.

Do you believe that when the farmer uses their private funds, their personal dollars, their family dollars that they have worked for generations to build and to grow that farm with, do you believe that when you have in excess of $¼ billion to use against them that when that farmer defends themselves and the court rules in favor of the farmer, do you believe that the agency should return the farmer's legal fees to them?

Dr. WEIL. Thank you for your question, Congressman.

I would begin by saying the budget that you referenced is to allow us to enforce a set of statutes that cover 135 million American workers in 7.3 million workplaces, directed towards every sector of the economy and it is in that context we deploy those resources very carefully through the range of enforcement and outreach tools that we have available to us.

The CHAIRMAN. Sir, let me rephrase the question then. When you, when your agency, when the people in your agency who I would respectfully submit that if they did not work for the Federal Government, they would be held in criminal court, for engaging in the coercion and the duress that the United States District Court said was used against this farmer. What recourse should the farmer have against your agency when the court rules in favor of the farmer?

Dr. WEIL. Well, I would begin—first of all, I can't directly comment on the particular case because, as you know, it is being litigated. I will say we undertake all of our enforcement activity, including in agriculture, and with respect to the hot goods as well as any enforcement activity, with very carefully crafted procedures and with a very well-trained investigative workforce.

The CHAIRMAN. Dr. Weil, with due respect, if you were operating in a fair and equitable manner we would not be here today. And this, when the government, when people in charge of agencies use the laws in a manner that the United States Courts say have infringed upon the American citizen's Constitutional rights, then with due respect, there should be consequences for the people that lead that agency, and for the people who engaged in that duress against the American citizen.

And I would respectfully submit that if there were we would not be here today and the conduct of your agency would be much better.

With that I yield to my colleague, Mr. Schrader.

Mr. SCHRADER. Thank you, Mr. Chairman. Dr. Weil, Dr. Wile or Wheel?

Dr. WEIL. Weil.

Mr. SCHRADER. Excuse me, sir. Dr. Weil.

Dr. WEIL. Thank you, Congressman.

Mr. SCHRADER. How often has the hot goods provision been used prior to this last decade on perishable agricultural products?

Dr. WEIL. In the period 2001 to 2013 we have used it 28 times.

Mr. SCHRADER. How about prior to that? I was asking prior to the last decade.

Dr. WEIL. I don't have in front of me figures regarding prior use of that. I know the first time hot goods was invoked in the agricultural industry, and this was towards a processor, was in 1946.

Mr. SCHRADER. Was it a processor, that is obviously a perishable situation? We are talking about either frozen, or packed, or canned type of products?

We are concerned at this hearing about the use of hot goods with regard to perishable products. I think we would all agree that as Commissioner Avakian indicated, it is a fine tool to use on non-perishable products because the value of the product doesn't deteriorate. But we are talking perishable. So the answer to your question is zero prior to your use in this last decade.

Why were these three growers targeted in Oregon in 2012? Why were they picked on? Why did you pick out these three?

Dr. WEIL. Sure, and again, I can't speak to the particulars of this case in litigation, but I would be pleased to speak about how we target our investigation resources generally.

We undertake what are called directed investigations throughout the country based on a very careful assessment of facts about the prevalence of violations of the Fair Labor Standards Act, across different industries in different parts of the country. All of our regions in our district offices engage in a review of industries in their area in terms of respective violations.

Mr. SCHRADER. Why then, all of a sudden, this new-found interest in using hot goods in perishable products? Why was that deter-

mined to be something that hadn't been done before, and the last few years seems to have been popular with the Department?

Dr. WEIL. Well, I would first point out and I would be happy to look back prior to the period where you ask your question, but from 2001 to 2008 during President Bush's Administration, we used the authority 17 times. And then we used it 11 again up until—in terms of closed cases since 2009.

Mr. SCHRADER. These were all perishable products?

Dr. WEIL. These are in agriculture.

Mr. SCHRADER. In perishable products?

Dr. WEIL. Well, yes, I mean, I would certainly acknowledge agriculture as perishable products.

Mr. SCHRADER. Well, I guess I would like after the hearing for you to get me that information. There is a big difference——

Dr. WEIL. I would be happy to.

[The information referred to is located on p. 43.]

Mr. SCHRADER. As I have tried to make crystal clear my question relates not to processed products but to fresh products. Have either of these farmers, any of these farmers in Oregon, have a past history of violation of Labor laws?

Dr. WEIL. While we used, as I said in terms of setting up our directed investigation protocols, part of what we look at is past behavior of individual employers. Our overall concern is driven by the prevalence of violations in a sector.

Mr. SCHRADER. Did these farmers have past violations, on child labor laws?

Dr. WEIL. Again, I don't want to talk about the particular ones in litigation. In general, in agriculture——

Mr. SCHRADER. The answer, I can give you the answer, actually. The answer is no. And it was clear to the Department when they came on the farm that these were good actors with no previous violations. Is it standard practice now for the Department of Labor to quarantine perishable products when you are doing an investigation without due process for these guys?

Dr. WEIL. So our procedure is to assure compliance with the law. We have used it in closed cases 11 times over a period of time, or 28 times over a period of time. We have done 7,500 agriculture investigations.

Mr. SCHRADER. So is this your first choice then? This is something you go to right away?

Dr. WEIL. Absolutely not, Congressman, and let me clarify that.

Mr. SCHRADER. Well, then why did you use it right away on these farmers that had no prior history of any violation? I am confused.

Dr. WEIL. Congressman, we use a procedure where when we find violations we undertake discussions with the grower or farm labor contractor involved.

Mr. SCHRADER. So you concluded these people were guilty because of the investigation? It is my understanding in the American judicial system, in the administrative system, people are not judged guilty through an alleged violation. Investigations take time. Yet, you imposed the hot goods order against Oregon farmers prior to even concluding your investigation. Do you think that is fair?

Dr. WEIL. Congressman, I would characterize our investigations procedure different than you did. In any investigation——

Mr. SCHRADER. I am just describing what actually happened. I know what you would like to do, but I am describing what actually happened. It is incontrovertible. A United States District Court said so.

Dr. WEIL. Sure. No, and Congressman, I am very proud of the investigators, the 1,100 people who work for my agency because they are trained in any investigation to undertake their evaluations of violations prior to meeting with the employer.

And then when they meet with the employer they have a systematic discussion of what they found in the course of their investigations that are based on discussions with workers, the employer——

Mr. SCHRADER. I am sorry to interrupt you again, but that is not what happened in Oregon. You know, this hot goods threat was levied as the court described very clearly, without the opportunity for the farmer to protect his livelihood, his investment, his crop. It was coercive, completely coercive. I would use the word *extortion.*

The Department of Labor, in my opinion, extorted money from these Oregon farmers. Completely inappropriate. I don't see how you can stand and defend that. I think the men and women that work in the Department of Labor are great folks, trying to do the right thing, but were obviously told, given a directive, to impose this arcane and inappropriate use of hot goods in perishable commodities. You are violating people's due rights. That is not good advertisement for what the United States Government is all about. We the People are being attacked by our own government without due process.

Does it bother you that a Federal judge has clearly indicated this is a coercive tactic used on perishable agriculture products? Does that bother you, Doctor?

Dr. WEIL. Congressman, courts have upheld the use of the hot goods provision since the passage of the Fair Labor Standards Act beginning with the Supreme Court in 1941.

Mr. SCHRADER. We are talking about perishable products again. You keep diverting over to other goods. We will all acknowledge, there are other goods, that is fine. But we are talking about perishable products.

What courts have upheld the use of hot goods in non-perishable products? We have this recent decision that clearly states it has not been used before, and this is the first case that unfortunately has to come before the court of the United States, again, using taxpayer dollars, trying to defend the basic rights of people when it should be crystal clear to the Department that this is an inappropriate use.

Dr. WEIL. Congressman, the statute does not exclude any sector based on perishability. As you know, the statute has only two very specific exclusions in terms of common carriers, and those who receive goods who are not knowledgeable about the good faith——

Mr. SCHRADER. So what about the courts? This is a United States District Court. It said that the usual practice had been to lift the hot goods provision, the quarantine, if you will, once the back fines and alleged wages were paid into escrow. Why was that not acceptable to the Department of Labor in this case?

Dr. WEIL. And again, as you know, I can't comment directly on the case because it is in litigation. We have very clear procedures. I want to go back to the fact that——

Mr. SCHRADER. Well, this was your policy.

Dr. WEIL. Yes, sir.

Mr. SCHRADER. The court did its research, too, not just myself, and the Committee. They did their research. They said the historical precedent had been once those fines and the alleged wages were held in escrow, while an investigation could continue, while the farmer could contest that, get the facts to be able to understand what was going on, the hot goods objection was lifted.

Why did that not occur in the Oregon case?

Dr. WEIL. We have a practice. We do use escrow in certain cases. It is judged on a case-by-case basis by the investigator, in consultation with the district office and the regional office of our agency.

Mr. SCHRADER. So why did you persecute these particular farmers then? I guess I am curious. Why not do the escrow? That seems very fair, respects due process, and still gets you the money and potentially these ghost workers the money they are due.

Dr. WEIL. The use of escrow is undertaken in cases where it is the judgment of the investigator, again, in consultation with other offices, our regional offices, as well as our solicitor's office, that there is progress in negotiations in good faith on the part of the employer where back wages can be put in escrow and goods can be allowed——

Mr. SCHRADER. Well, they did that. They did that. So why wasn't the quarantine that was imposed not lifted?

Dr. WEIL. Well, in the—I can't comment on the particulars of this case. I can comment that our procedures are very clear in what instances we uses escrow, and it is where we are having progress towards resolution which we fully acknowledge.

Mr. SCHRADER. You had policies here. I mean, you are violating your own policies. You are violating your own policies—your Department violated what you just said. It is sad. This is indefensible. You keep digging a bigger hole for the Department of Labor with your testimony, sir.

Dr. WEIL. Well, I don't think so. What I am trying to clarify is that we have very clear procedures and practices that we do institute, and certainly under my watch, I am very aware about the issue of perishability that you are raising.

And that is why in order to both protect workers and protect the employers who are complying with the law, the vast majority of employers are farmers who are living within the statute, are also being protected by our procedures which, again, in only 28 of 7,500 investigations have we actually used. We have used. We have used——

Mr. SCHRADER. You can't even describe whether or not these were all perishable cases. I would hope that in the future the Department of Labor would be a lot more respectful of our Constitutional guarantee of due process if they are going to use this hot goods provision. I strongly advocate it not be used in a perishable cases, or if it is, that once the farmers pay their fine, their alleged fine and their alleged back wages, that the Department would at

least let these products go forward so American commerce could resume. We are in tough times now, Dr. Weil.

And I will yield back.

The CHAIRMAN. Thank you, Mr. Schrader.

We are going to try to hold to the 5 minute limit. Then we will, as I said, we will have multiple rounds of questioning.

And I would now like to recognize Mrs. Hartzler.

Mrs. HARTZLER. Thank you, Mr. Chairman.

Dr. Weil, this is a question for you. If a farmer offers all of his or her workers a compensation package based on performance, and those workers were to take advantage of that opportunity by working harder to receive the higher compensation, is that a violation of the Fair Labor Standards Act? Yes or no is fine.

Dr. WEIL. No, that would not be a violation as long as they earned at least the minimum wage for the individual worker.

Mrs. HARTZLER. In a recent enforcement action the Department of Labor determined that anything over 60 pounds of blueberries picked per hour to be abnormal when expert sources and research has proven that normal is anywhere between 100 and 200 pounds. Is it normal practice for the Department of Labor to ignore the research of experts in agriculture production in harvesting when taking enforcement actions against farmers?

Dr. WEIL. Congresswoman, we undertake, in order to make an assessment of whether the piece rate that is being provided and the actual work done complies with minimum wage standards through a combination of interviews with workers in the fields, at the actual employer involved, a review of payroll records, and a discussion with the employer and any farm labor contractors in order to ascertain whether individual workers have been paid according to the minimum wage.

We are increasingly using time studies based on the activities of workers in the field at the time of the investigation because, as you know, there is an enormous variability in the rate of any farm activity that can be done based on particular conditions, harvest, even sometimes subsequent rounds of harvesting, the same crop can yield different kinds of rates of output.

And so that is why we have to look very closely and rely in particular on employers keeping good records so that we can ascertain whether a piece rate meets the minimum standards, or goes beyond that.

Mrs. HARTZLER. So as you recall, many of these workers are paid based on productivity, or at an hourly rate, so are these works compensated by the Department of Labor for the time they are unable to work due to these interviews you just talked about?

Dr. WEIL. We try to, to the best of our ability, and again, that begins with our hope that employers are keeping good records which assist both them and the workers in making a judgment about whether in the period of time we are investigating, whether workers have been compensated for their time at least meeting the minimum standards of the Fair Labor Standards Act.

Mrs. HARTZLER. Now, a lot of these workers have a contract labor agreement with the employer ahead of time based on compensation, based on productivity, and not necessarily hourly. So does the

Department of Labor have authority to change the terms of these compensation agreements?

Dr. WEIL. No, we do not. And in fact, our whole statute and our procedures in the agricultural area are built around the fact that we know that piece rates are a common practice used throughout agriculture in lots of different industries and what we are trying to ascertain, again, is whether workers have been compensated to the minimum standards provided in the law, which is the minimum wage in the Fair Labor Standards Act.

That requires us to have very careful specific procedures to ascertain whether that has been attained, and you are quite right, in agriculture, that often is the piece rate. So that is the basis we make our comparison in trying to very carefully see if each worker has been paid according to the piece rate compensation system in such a way that it meets the minimum standards required by the law.

Mrs. HARTZLER. Now, in a recent enforcement action the Department of Labor insisted that a farmer waive all rights for future action on the issue including appeal. Now, is this the policy of the Department to intimidate farmers into waiving their Constitutional due process rights?

Dr. WEIL. I think you are describing a consent judgment, which is a very common occurrence where a court reaches agreement with all of the parties, where parties agree to that, and one of the provisions of a consent judgment is that the final agreement will be respected by the parties.

So if you are speaking about a consent judgment, which is entered in voluntarily by the parties in conjunction with a court, those typically say that those—the agreement or the terms of the agreement——

Mrs. HARTZLER. Well, I have 7 seconds left. What was there on the ground, or in this case, or has the Department ever asked a farmer, or said, here is your fine, but if you promise not to appeal, it will be X amount. It will be less?

Dr. WEIL. That would not be, the procedure would not be undertaken in that way. Certainly, in regards to what I would want our investigators to do, and the way they do carry out, that we would get to that stage through a different process than your question implies.

Mrs. HARTZLER. Okay. I yield back.

The CHAIRMAN. Thank you, Mrs. Hartzler.

I can tell you that is exactly what has been done by other agencies. I know where they levied a multi-hundred thousand dollar fine and said, but if you will write us a check for $25,000, for example, we will waive all of the other fees. That has been done, I know by the EPA in my district with regard to paperwork violations.

Ms. DelBene.

Ms. DELBENE. Thank you, Mr. Chairman.

I would like to thank Chairman Scott and Ranking Member Schrader for holding this hearing, and thank you Dr. Weil and Commissioner Avakian for being here today.

No one here would condone violations of the Fair Labor Standards Act, but the actions taken by DOL in regards to these cases appear to be egregious. My district in Washington State is one of

the largest berry growers per capita in the country. This is especially true for raspberries, and increasingly so for blueberries. I am very concerned that we will see these actions repeated in my district against farmers who play by the rules.

It seems like your investigative method leaves our constituents with a false choice, admit guilt where there may not be any, and pay a hefty fine to save your crop, or fight the case and lose the crop.

For example a blueberry farmer in Washington State was cited for employing underage children which that farmer denied. However, that farmer, the employer, could not verify or dispute the violation claimed by DOL because DOL refused to release their notes. Hot goods was invoked on 26,000 pounds of blueberries and a 30 day hot goods hold was placed on the rest of the crop worth about $35,000. The employer was forced to admit guilt.

So, Dr. Weil, the scenario, and we have heard many of these scenarios before, you have someone in a situation where they have no place to go for due process. They have to potentially give up their crop. Does that seem fair? Is that an appropriate action to be taken?

Dr. WEIL. Thank you, Congresswoman. I feel like I should clarify the process because I want to be clear.

Ms. DELBENE. I just want to say this: the fundamental part here is that you have created a situation where a grower may have only a few days to go to court, win a judgement, and make their crop available in the market for them to meet the asking price without suffering a loss, or a decline in value.

Do you ever think it is okay to do that? Do you understand the situation you are putting a farmer in who may very well have a strong defense, and if they defend themselves they may not get their crop back in a saleable condition?

Dr. WEIL. And thank you.

What I wanted to clarify is our investigators cannot block shipment of the goods. They are not allowed to do that. When they find violations in the course of an investigation, when they meet with the employer, they ask the employer to voluntarily restrain shipment of those goods until the situation can be resolved.

If a resolution can be made, which it is in the vast majority of cases, the shipment of goods are released and everything proceeds with both compliance, assuring both the workers that they have received what they are entitled, and that other farmers who are complying with the law are not put at a disadvantage——

Ms. DELBENE. But an agreement means an admission of guilt for someone who may feel like they have a case and are not guilty of the violation they have been accused of?

Dr. WEIL. If the parties feel that they are not—that the violations are inappropriate, they are within their rights, and if we feel we need to not allow the goods to flow, we need to go to a Federal Court.

And in a Federal Court both the employer, the grower, the farm labor contractor, and the——

Ms. DELBENE. But you understand that every day for a perishable product like a berry, is prevented from going to market its

marketability declines, in the end even while a court may find that they are not guilty of the infraction?

Dr. WEIL. Right.

Ms. DELBENE. Are you going to pay them back for the product that they weren't able to take to market?

Dr. WEIL. We are very aware, and again, this is why we use it only in very specific instances, of the perishability of the product, and that is why we move quickly to resolve the problem as quickly as possible for the benefit of the workers and of the growers involved.

Ms. DELBENE. But it is not. In a perishable case, without defining what *quickly* means, that product is gone. That farmer who, if found not guilty, now has lost their product unfairly, and that can't be returned to them. Isn't there another method that can be used without taking their crop?

Dr. WEIL. Again, we can ask the parties to voluntarily refrain from shipment, but we do not seize the goods. We are not allowed. We are not authorized by the statute to seize the goods. We can go to a court in the case that we can't resolve, which are, what are, when we have used this authority in significant cases. I would point out that the average hot goods case has back wages due that are six times the level of overall agricultural cases; that the number of employees affected are eight times——

Ms. DELBENE. But Dr. Weil, I just want to point out that we are not talking about all hot goods cases. We are talking about a very specific cases of perishable, only perishable goods because once again, the value will be gone by the time it comes to resolution.

I have run out of time so I yield back. I think it is important for you to distinguish between perishable commodities and those that are not, because we feel like there is a big difference between these two perishable categories.

Thank you, Mr. Chairman, and I yield back.

Dr. WEIL. I understand that. Could I just clarify, Congresswoman, that the statistics I gave you were specific for agriculture.

Ms. DELBENE. It is not just agriculture. Perishable goods, not all of agriculture has the same deadline that, for example, for certain fruits and vegetables have.

Thank you, Mr. Chairman.

The CHAIRMAN. Before I recognize Mr. Yoho, Dr. Weil, she asked you a very specific question in whether or not the agency would reimburse the farmer for the loss of their value and the answer to that is no. You did not answer the question, but the agency has never reimbursed the farmer for the loss, have they?

Dr. WEIL. The agency has enforced the Act which is our primary responsibility.

The CHAIRMAN. Have you ever reimbursed the farmer for their loss from your action?

Dr. WEIL. I would have to—I am not aware of a situation like that.

The CHAIRMAN. Thank you. Mr. Yoho.

Mr. YOHO. I want to continue on that, Mr. Chairman, and I appreciate it because this is something that needs clarification. That was one of my questions. If a hot goods provision is used against a farmer and a perishable crop is prevented from being sold, and

you said it is voluntarily, but as we have heard and I have experienced in our area with blueberries, watermelons, row crops.

If that is voluntarily giving up and the investigation goes on, and that farmer is found not guilty that he did not break any laws, who is responsible for the price of that crop? If charges are brought against him and he voluntarily gives it to you, turns it over, but then with the investigation, they say, well there is no violation here, and that crop is gone, the value is zero, who pays for that crop?

Dr. WEIL. We would not, Congressman, enter into—the whole use of the hot goods would occur after an investigation is completed. And where there is——

Mr. YOHO. Well, in the case of the Oregon farmer with the blueberries, wasn't it Dr. Schrader, the blueberries, that crop, was that not held up and not sold?

Dr. WEIL. There was an investigation.

Mr. YOHO. Did the crop get held up?

Dr. WEIL. Well, again, I don't want to talk about the particulars of that case because it is in litigation. In any of our agricultural cases where we have invoked the hot goods, the sequence would be: We find significant and systemic violations. We enter into discussions with the employer and the farm labor—or the farm labor contractor about our findings. In the course of those findings, or in the course of those discussions, we would indicate that we think there are goods that are hot, that might also be because of not just back wages, but because of child labor violations.

Mr. YOHO. Well, I have had situations where they have come on the watermelon farms you have a short time you brokered those melons and if something comes up like this and you are out there and you say, "Hey, we have labor violations there," that farmer, according to you, has the right to voluntarily relinquish his crop or sell it.

If he voluntarily relinquishes it, on the threat of he is in violation, and then it is proven he is not and that crop doesn't go anywhere, there is a lost crop. Somebody has lost some money on that and there should be restitution back to the farmer if he is found innocent.

I want to move on to something else. You stated between Fiscal Year 2009 and 2013 Wage and Hour concluded nearly 7,500 ag investigations. Do you have figures for the years of 2005 to 2009, the amount of active investigations that were concluded? And if not, can you get me those.

Dr. WEIL. I could. I would be happy to get you those.

[The information referred to is located on p. 44.]

Mr. YOHO. I would love to see those. Again, I come from a large agriculture area.

Dr. WEIL. Yes, sir.

Mr. YOHO. And there is that big differentiation between perishable and non-perishable like a peanut. You know, you can plant or harvest a peanut, and you don't have to rush it right away like you would a blueberry to a storing locker.

What we have seen in our area is there has been an escalation in the Department of Labor investigations in these fields where there is migrant labor. And I understand why you are doing that.

But there has almost been like a rabid response—I have been around agriculture since I was 16 years of age, and we have seen just a ramp-up in the amount of investigations with this Administration.

And I base that on talking to a person at HHS and the Department of Labor. And I asked them if they have increased the amount of investigations. And they said, "Oh, yes. Under this Administration, we were ordered to increase those."

And I want to know why that is.

Dr. WEIL. Well, let me speak about what we have done in terms of Wage and Hour in targeting our investigations.

And it is very true since the beginning of the Administration we have focused on sectors of the economy where we find evidence—and, again, we are very data-driven—of higher levels of violations and have focused our attention, given the fact that we have only 1,100 investigators and 7.3 million workplaces to investigate, on industries, including some agricultural industries, where we find high levels of violation.

So the trend you are describing is part of a larger emphasis on focusing our very limited resources on the industries and employers where we believe the violations are highest. And that is very consistent with the basics of our statute in terms of both protecting workers and responsible employers who are playing by the rules.

Mr. YOHO. And I get the same feedback from the producers in our area, that the Department of Labor treats our producers like they are guilty and needed to be proven innocent. And I am hearing that in Florida. I am hearing that in Washington and Oregon and where Mrs. Hartzler is from.

And I will save my questions for the next round.

The CHAIRMAN. Dr. Weil, before I recognize Ms. Kuster, I think profiling is illegal.

Ms. Kuster.

Ms. KUSTER. Thank you, Chairman Scott and Ranking Member Schrader, for holding this hearing.

And thank you to our witnesses today.

I believe that enforcing our labor standards and ensuring the equitable treatment of farmworkers is incredibly important, but I am concerned about the heavy-handed actions taken by the Department of Labor when it comes to the cases that we have heard about today in Oregon.

I have spent a lot of time over the past year talking to farmers in New Hampshire, and I have heard quite a bit about the difficulties they face trying to comply with shifting requirements and disagreeable staff at the Department of Labor.

I believe in enforcing our Wage and Hour laws, but I also think that the Department of Labor needs to start making a greater effort to work with the states and with the farmers in this process.

My questions this morning are for the Commissioner.

Can you talk to me about your concerns with the approach that the Department of Labor took in these cases and whether there are other tools that could be used to ensure that farmers are adhering to our labor standards.

Mr. AVAKIAN. Mr. Chairman, Congresswoman, there are many different investigative tools and prosecutory tools that can be used,

other than hot goods, in the thousands of investigations we do and in what I am sure is the tens of thousands of investigations that the United States Department of Labor does. Statistically speaking, virtually none of those use the hot goods.

And so you do a full investigation, oftentimes based on probable cause that a violation is occurring somewhere. After you have a substantial amount of evidence that a violation has occurred, you issue charges. And then you enter a prosecutorial process in which the respondent, like a defendant, has a chance to then defend themselves.

That would be the typical process used. And that works very well with respect to prosecuting bad actors and protecting workers.

In this particular case, we have, I suppose, two primary concerns. One is that, first, we disagree that—we think that there is an inherent problem with the use of the hot goods provision with respect to perishable items, even if you do go through the right process of getting a hot goods order.

But in the cases in Oregon, it involved not the obtainment of a hot good order, but the threat of one, and that the farmers could avoid the legal process of the hot goods motion if they simply paid up and paid up quickly. That disparity in power is what causes the Constitutional due process and, we think, search and seizure and commerce clause problems.

The second concern we have is, post the Federal District Court's order vacating the consent judgments in Oregon, we do not know what the status of the damages are, where the money is, and are unclear why, given the order vacating the judgments, the money has not been returned to the farmers.

Ms. KUSTER. Well, it seems to me, as an attorney and a litigator, and as a practical matter, doesn't it make more sense to you that, if the goods were sold, then the farmer would be in a position to pay whatever fines were due if that person was found to be in violation?

The whole point of our judicial process, innocent until proven guilty, is that you have the opportunity to make your case. And I am quite confident that the legal sanctions would be sufficiently strong to discourage violations. My time is up, but I am just wondering, doesn't that just make more common sense?

Mr. AVAKIAN. Mr. Chairman, Congresswoman, yes. It makes common sense. But you also are implicitly hitting on a very important legal concept that also is related to the deprivation of due process rights here.

In a hot goods action, if, hypothetically, the government were to take the goods, sell the goods, or in some way obtain the money that it is worth, that would be one thing, because then the money could be used to pay the workers or could be held in trust while the investigation is completed and, if the investigation exonerates the farmer, the money could be returned.

The difficulty here is what—the legal term of *conversion*. In this type of a situation where the blueberries, for instance, are held in a warehouse for more than 3 or 4 days and possibly spoiled, the value of the goods has been converted to zero.

Ms. KUSTER. Right.

Mr. AVAKIAN. And there—not only is not then money available in order to pay the workers, but there is no value of the product left either for the government, for the farmer, or for the workers. And that conversion of the goods is what creates the imbalance of power leading to the deprivation of Constitutional rights.

Ms. KUSTER. Thank you very much. And thank you for making the trip out here. That was precisely my point, but you said it much more clearly.

And thank you, Mr. Chairman. I yield back.

The CHAIRMAN. Thank you. Mr. LaMalfa.

Mr. LAMALFA. Well, we have burned over an hour already in this Committee.

Dr. Weil, since we can't talk specifically about a case, have you ever had like a traffic violation or some sort of thing where you have had to—received a ticket for something to do with your car, whether it was parking or speeding or some other thing like that? You ever got one of those?

Dr. WEIL. I feel I should have advice of counsel before answering that question.

Mr. LAMALFA. That would fit with the hour so far.

Dr. WEIL. Yes, I have. I have.

Mr. LAMALFA. And so have you ever felt like some of those were maybe not just and you send the ticket in there with a payment and you want to fight it in court? You ever done that?

Dr. WEIL. I have, on occasion.

Mr. LAMALFA. Yes. Me, too.

But I always get this yucky feeling when I send the check in with the thing—with the notice, the summons, whatever you call it, that my chances of getting my check back aren't very good because I am probably going to be found guilty anyway.

I think that is the same feeling, only multi-extrapolated, that these growers face, is that, "I am probably not going to get a good shake at due process here."

And then, when you invoke hot goods and you have a perishable product—I am a farmer in my real life, too. I happen to farm rice. So perishability is a lot different than it is for fruit growers and other crops of that nature, milk, like that.

And so you have bought berries at the store. Right? Blueberries, strawberries, raspberries especially. Right?

Dr. WEIL. Yes, sir.

Mr. LAMALFA. And so, when you get them home, if you kind of forget about them in the back of the refrigerator for a couple of days, you get—that white fuzz starts growing on them. Right? And so you think, "Boy, that was sure a short shelf life for my berries."

And so actions like this just take a big chunk off the back end of the shelf life of the farmer's product that he is trying to get to the market. And I don't see how in the world that—if you brought an action to them, that it would be seen as fair in any fashion.

And why in the world—answer me this question. Why would they want to voluntarily hold on to that crop, whether it is in the field or maybe a warehouse that they are paying by the hour or by the day to keep it cold-stored and maybe it is a warehouse that has a fast turnover and you have to get this product out because the next farmer is coming in?

Why would they voluntarily keep that if they feel that they are in the right and they have to get this product to market before the white fuzz starts growing on it that we have all experienced in our refrigerator?

Dr. WEIL. So—and my staff knows I love analogies as well.

So if I could go back to your first analogy and then go to your second analogy, when I make the decision whether or not to contest a traffic ticket in my hometown, I do it on the basis of a trust that, if I do decide to contest that ticket, I will get due process.

Our procedures are to provide growers or employers, generally, that same confidence in the process. That is why we have these procedures that are very carefully undertaken——

Mr. LAMALFA. But, sir, the government is not holding on to your car in impoundment in this case so you can't get back and forth to work or drive to get your kids to school or whatever is going on——

Dr. WEIL. And neither do we seize the goods. We are not allowed to seize the goods. We do not——

Mr. LAMALFA. You talk about voluntarily holding on to the goods. Why would they do that when they have that time line? You get the time line. Again, you get how stuff rots in the fridge or cold storage. Why would they do that?

Dr. WEIL. And that is why our investigators move with alacrity in those situations——

Mr. LAMALFA. Alacrity?

Dr. WEIL.—because we know that the goods are perishable. And we are very cognizant of that, and that is why we have used this particular provision in very few of the 7,500 cases involved in it. I——

Mr. LAMALFA. But when you are that case, it is a big deal. When you are that case. And so you either sign on the dotted line saying, "I basically admit guilt, and I pay a fine or put it in escrow."

See, what I do not understand is that—how come you can't recognize the timeliness of this and still have your investigation ongoing? And if they are fine—or if they are guilty, you can fine the heck out of them later.

Dr. WEIL. Right.

Mr. LAMALFA. But you go though your investigation. But why would you have the grower held up with the perishable product that is going to have fuzz growing in the customer's refrigerator?

They may not buy that brand anymore from that store anymore because they don't like that berry now because of this holdup on a hot good that is a perishable product. That makes no sense to me.

Do you get that, sir?

Dr. WEIL. I understand what you are saying, Congressman. And that is why very often, when we feel the discussions are moving in a positive direction, we use escrow for precisely the reasons you have describe.

Mr. LAMALFA. How many days between these discussions and escrow? What if it is on a weekend? How does all this work?

Dr. WEIL. It would depend on the particular instance that we are discussing. But there is—in the vast, vast majority of cases, those

goods move, including the cases in Oregon. Those goods moved. They were not withheld, ultimately. There was a resolution——

Mr. LAMALFA. Under a possible threat of being taken to court and having a procedure done in court to cost them more and more money, unless they just give in and go with it.

Mr. Chairman, I will yield back until the next round of questions.

The CHAIRMAN. Dr. Weil, you stated that you had only used this 28 times. Is that correct?

Dr. WEIL. That our—our records in our investigation show the hot goods provision being used 28 times since 2001. Yes, sir.

The CHAIRMAN. How many times have the people in your agency threatened to use it?

Dr. WEIL. My understanding of how we keep these records is that these indicate times that the hot goods provision have been invoked by our investigators.

The CHAIRMAN. In other words, you have no idea how many times your investigators have threatened the farmer with them?

Dr. WEIL. It would be against our protocols—again, I wouldn't—I wouldn't call it threatening employers or farmers.

It would be getting to the point where they are being asked to restrain shipment of the goods because of the findings of the investigation.

The CHAIRMAN. If an 800 pound gorilla comes up to you and says, "Give me your wallet or I am going to take your car" and you hand over the wallet, did you voluntarily give the wallet?

Dr. WEIL. I—I——

The CHAIRMAN. It is a hypothetical. We won't waste time on that. But I will get to some specifics, if you will.

Dr. WEIL. Yes.

The CHAIRMAN. First of all, the only reason that this is still in court is because the agency is using taxpayer dollars to appeal the ruling of the court, which the farmer—again, the American citizen—had to use their private dollars to defend themselves against their government.

And that—the government is the 800 pound gorilla in this case, and the farmer won. And I quite honestly think you are trying to teach that farmer a lesson in that, "If you stand up for your rights, we are going to pummel you," as the 800 pound gorilla.

You stated that there have been 7,500 investigations.

Dr. WEIL. Yes, sir.

The CHAIRMAN. And that there was $20 million collected from those investigations, for 46,600 workers. So your average investigation yields $2,666.

How much do you spend on those investigations? How much have you spent of taxpayer funds on this court case?

Dr. WEIL. On the 7,500 cases or on the cases——

The CHAIRMAN. On the 7,500 investigations, how much have you spent?

Dr. WEIL. I would be happy to provide you those figures. I couldn't say offhand.

[The information referred to is located on p. 44.]

The CHAIRMAN. I would appreciate that.

And I would also appreciate—I would like to know how much the government has spent in this case that, again, the court has already ruled in favor of the farmer and the farmer is having to use their private funds because you, as the 800 pound gorilla in this case, have chosen to push them into the appeals process.

You know that you can spend them into bankruptcy. You know you can spend that farmer into bankruptcy. And there should be recourse for the citizens of this country when the 800 pound gorilla does anything and everything that they can to take everything that they have. There should be recourse.

And there is an Equal Access to Justice Act that is out there. And, quite honestly, I think that the farmers should be compensated for everything that you have done to them, and it should come out of the budget of your agency. And if that happened one or two times, then a lot of this stuff would stop.

Mr. Avakian, thank you for being here.

Have you ever seen—when is the first time that you saw the hot goods orders used with regard to perishable products?

Mr. AVAKIAN. Mr. Chairman, the three farms that it was used on in Oregon that Congressman Schrader spoke about is the first time that we experienced the use of hot goods in Oregon, to my knowledge.

The CHAIRMAN. And what dates were those?

Mr. AVAKIAN. It was 2 years ago. Forgive me for not coming up with the exact dates.

The CHAIRMAN. And they used it on three separate farms?

Mr. AVAKIAN. That is correct.

I might add, Mr. Chairman, too, that, at the time, we took a very strong position against the use of hot goods, articulated that to the U.S. Department of Labor, and they have not used the hot goods provision in Oregon since, to my knowledge.

The CHAIRMAN. Thank you for standing up for the farmers.

And what are the common denominators—they have acknowledged in their testimony here today that they have specific things they are looking at and who they are going to target with their investigations.

Have you seen a common denominator with who they are targeting in their profiling of who they are going after?

Mr. AVAKIAN. No, Mr. Chairman.

The CHAIRMAN. I yield the remainder of my time.

Mr. AVAKIAN. Mr. Chairman, just to clarify, I do not have any knowledge one way or the other with respect to that.

The CHAIRMAN. Mr. Schrader.

Mr. SCHRADER. Thank you, Mr. Chairman.

Commissioner Avakian, the Department of Labor has indicated that this hot goods authority is absolutely necessary to compel compliance among producers with perishable goods. They refuse, apparently, to think of alternatives.

In your judgment, in your experience, could compliance of potential violators be achieved with alternate means besides imposition of hot goods on perishable products?

Mr. AVAKIAN. Mr. Chairman, Congressman Schrader, oftentimes when you are trying to catch a bad actor, it is not an easy thing to do.

And, as I said earlier, it is important to aggressively prosecute bad actors not only to protect workers, but to make sure that the businesses that do follow the rules have a level playing field.

And you want to use every tool at your disposal in order to protect the good businesses as well as the workers. However, in our system, administrative or judicial, there is always a balance between respecting the Constitutional rights of people that are in that type of an investigative or prosecutorial process with the need to protect the workers.

In our judgment, the use of hot goods with perishable items creates a situation in which there is much, much too much, leverage on the part of the government to extract whatever type of agreement would be necessary from a suspected, not proven, bad actor. And that huge imbalance of power creates a Constitutional due process problem.

And so we do believe that, whether or not that kind of leverage would be effective in getting a result, it is just inherently the wrong method to use and that we should rely on the other tried and true and tested methods that we use in investigations and prosecutions.

Mr. SCHRADER. In the case with the Oregon farmers in 2012, the Department refused consistently to give virtually any details of their investigation and the alleged violations.

What is the policy for the Oregon Department of Labor in disclosing details of alleged violations to individuals?

Mr. AVAKIAN. Mr. Chairman, Congressman Schrader, we do—between our Civil Rights Division and our Wage and Hour Division, we do, on average, over 5,000 investigations a year.

We receive over 60,000 calls a year from Oregonians with questions about their rights on the job or in housing and, like I said, respond to about 20,000 calls a year from Oregon businesses that are looking for cooperative help in navigating the regs in state and Federal laws.

So we have a good deal of experience in fielding questions from business and from the public in these types of situations.

Generally speaking, what we look for is whether or not there is probable cause that some type of violation is occurring. So either somebody calls and gives us their story of what is happening to them on the job or we get a tip from a third party that there may be violations occurring.

And if we believe it is credible evidence, we send an investigator or a team of investigators in order to interview the worker, to get documents from the employer, interview the employer.

If we believe that there is substantial evidence that a legal violation has occurred, we issue formal charges and, at that point, enter a prosecutorial system in which we, on behalf of the people of Oregon, are trying to obtain damages for the individual we believe was harmed.

And, in that process, the employer has the ability to defend themselves in front of an administrative law judge, with my position of Labor Commissioner being the eventual decider of the case. That is the process we use.

Mr. SCHRADER. That sounds like a very different process than what we have heard outlined with the Federal Department of Labor at this time.

How closely does the Federal Department of Labor work with you in investigations? My understanding, based on your testimony, there is more investigations ongoing in Oregon as we speak, several other farms being checked into. How much lead time did you get on these folks coming to Oregon? How do you work with the Department of Labor?

Mr. AVAKIAN. Mr. Chairman, Congressman Schrader, in the cases of the three blueberry farms a couple years ago, we didn't know about those investigations until they were occurring.

I must say that Dr. Weil has very graciously in recent weeks called me personally, extended his hand in a cooperative effort for our agencies to work together in the future to use the best of our resources as efficiently as possible, and I am quite encouraged by the reaching out that he has done in recent weeks.

Mr. SCHRADER. So, how much notice did you get for the investigations that are ongoing right now? You talked with Dr. Weil a few weeks ago, apparently. How much—did he talk to you about the investigations that, obviously, the Department plans, months, maybe a year, in advance. Did he talk to you about coming out to Oregon at that time?

Mr. AVAKIAN. Mr. Chairman, Congressman Schrader, I think you are referencing some recent investigations in the last couple weeks on ten or eleven blueberry farms in Oregon.

We didn't have any idea of those investigations until they were occurring. So we are looking forward to a very cooperative future with the Department of Labor.

Mr. SCHRADER. It doesn't sound like things have changed very much, with all due respect.

Dr. Weil—if the Chairman will indulge me just a little bit here—two points I would like to hone in on here going forward.

You have testified that your agency has done over 600 education events across the country trying to inform producers, manufacturers, whoever, about their rights.

The Department of Labor has had a Memorandum of Understanding with the Oregon Farm Bureau along those lines. It was actually canceled by the Department of Labor a few years ago. It was specifically designed to help farmers know how to comply with the Wage and Hours laws of our country.

In 2012, the Oregon Farm Bureau had asked the Department of Labor, the Portland Director Genkos, with the Western Director, Rosales, present, to review the MOU for education. You know what they were told? And I will quote you here: "We are an enforcement agency, not an education agency."

How do you reconcile that with your statement and what you alluded to before?

Dr. WEIL. Thank you, Congressman.

The spirit of what I spoke about at the beginning, the 600 outreach cases that I discussed, are specific to agriculture. I can describe to you 24 different outreach efforts that we have done just in the western region, many in Portland, over the recent period of

time where we have done outreach specifically to employers and farm labor contractors.

Mr. SCHRADER. Why in my region is that not happening?

Dr. WEIL. That is—many of these are in Portland. And I would be pleased to provide you a list of these events.

[The information referred to is located on p. 44.]

Mr. SCHRADER. It seems like the director out west and in the Portland area in particular is not reading your memos and does not agree with you. I would appreciate it if you would reach out to them and talk with them in a little more detail.

Dr. WEIL. I would be happy to do so.

Mr. SCHRADER. The other concern I have that was alluded to in testimony is: Where is the money? Where is the farmers' money? The court vacated your decision. Where is their money?

Dr. WEIL. Well, the court—that particular instance is still in litigation; so, I am not quite sure.

Mr. SCHRADER. Well, where is the money? I mean, your agency has their money. Where is it?

Dr. WEIL. The money is kept in the Treasury——

Mr. SCHRADER. It is $¼ million.

Dr. WEIL. Oh. It is kept in the Treasury until resolution——

Mr. SCHRADER. It has not been returned to them even though the court has vacated your decision?

Dr. WEIL. Well, that indicates it is in litigation, as you know. And so it would be inappropriate at this point until the process has run its course or——

Mr. SCHRADER. No. I respectfully disagree on that account.

How did you determine how many workers there were? You know, the farmers contested successfully in court that they paid all their workers what they were due.

How did you determine that there were 1,100 additional workers out there? You talked about time—this is one of your time studies that you did?

Dr. WEIL. Sure. Again, I can't speak about the particulars of this case. I can say, in any agriculture investigation, there is a process where investigators go to the fields in order to ascertain the number of workers who are present——

Mr. SCHRADER. How do they do that, generally speaking?

Dr. WEIL. By, basically, going to the fields, counting workers, speaking to workers, and then speaking with employers, looking at payroll records and, basically, triangulating——

Mr. SCHRADER. And how do you figure out that there are missing workers? What does the agency do to figure out there are missing workers?

Dr. WEIL. Well, the calculations are based on an assessment of the number of workers in the field at the time of the investigation——

Mr. SCHRADER. How do you get that calculation is what I am asking?

Dr. WEIL. Oh, I see. By counting people. I mean, by——

Mr. SCHRADER. If they are not there, how do you count them?

Dr. WEIL. If they are not there, they would not be counted.

Mr. SCHRADER. So, then, why is the agency worried about 1,100 workers that were not there?

Dr. WEIL. Well, again, that regards the particulars of the specific cases in litigation——

The CHAIRMAN. Well, I can actually tell you that you don't know your own procedures. You actually have a model that you use. There is a model that you use.

The model figured out that it was impossible for workers to pick more than 60 pounds of berries in an hour. The model determined that. They didn't go to the field. They didn't talk to the workers about, "How many can you pick in an hour?" That wasn't done. It was based on a model. There was no time study done at all.

As a matter of fact, there was a time study done after the fact by a former Department of Labor investigator. He determined, in a third picking—not the first, which is usually the most bountiful, but the third picking—that the lowest amount of berries picked was over 100 pounds. Top picker, 196 pounds. That is the real world, not a model. That is the real world.

How many workers do you suppose this investigation has found out of these 1,100 alleged workers identified with this bogus model that you have used?

Dr. WEIL. Representative Schrader, I cannot speak to the particulars of that. I cannot—I cannot——

Mr. SCHRADER. I thought you might say that. I can tell you: 70, 74.

And how does the Department determine if a worker, generally speaking, was on the farm and should get paid? How do you find that worker?

Dr. WEIL. That is very clear, sir.

Mr. SCHRADER. Oh, good.

Dr. WEIL. When we undertake investigations, we go out to the fields. We interview workers in the fields. We also look at the payroll records of the growers. This is precisely why record-keeping is an absolute bedrock——

Mr. SCHRADER. How do you find workers that you claim are not on the payroll?

Dr. WEIL. It is one of the challenges of enforcing the law entrusted to our agency——

Mr. SCHRADER. How do you find them? What do you do?

Dr. WEIL. We use——

Mr. SCHRADER. I am asking just a basic question.

Dr. WEIL. Yes, sir.

Mr. SCHRADER. It is not a trick question.

Dr. WEIL. I am attempting to, sir.

We use the payroll records that the employer is supposed to keep. Often in significant and difficult cases where one of the major problems is farmers have failed to follow the statute's requirements of record-keeping, it makes it difficult to follow up on those workers.

That is precisely why in the agricultural industry not only do we need to move quickly——

Mr. SCHRADER. You are not answering the question, Doctor.

I am asking you: How do you find these workers that you claim were on the farm? What is the policy?

Dr. WEIL. If we don't——

Mr. SCHRADER. Apparently, you don't have a policy.

Dr. WEIL. Yes, sir. If we don't——

Mr. SCHRADER. It is not very clear and it is not simple, like you said 2 minutes ago.

Dr. WEIL. If we don't have payroll records maintained by the employer as required by the law, we have to use other means to find those workers. We use—for instance, we have agreements with the Mexican consulate to have them help us locate workers who were denied their—the wages——

Mr. SCHRADER. I can tell you in this case in Oregon how you did it. You are apparently, with all due respect, not very knowledgeable about your policy or you don't have a policy, either of which is a shame.

They advertised in the local paper or on the radio: "Hey, did anyone work at such-and-such farm during this time period?"

And to the credit of the members of my community in the State of Oregon, there were only 70 folks who said, "Yes. I worked there. Please give me some money."

Dr. WEIL. Right.

Mr. SCHRADER. Out of 1,100 opportunities, only a few people walked up. Maybe a couple of them were on the farm. I don't know. There is no way to actually know.

Where is my farmers' money? Does that money revert back to the Treasury and not go to those farmers at some point in time?

Dr. WEIL. Congressman, because of the nature of the migratory workforce in agriculture, the challenges you describe are very real. And that is why we have to use a number of different methods to try to locate workers, in general, in the agricultural industries, which are sometimes hard to find, particularly——

Mr. SCHRADER. Where is the money?

Dr. WEIL.—where the employer has not kept adequate records.

Mr. SCHRADER. Mr. Weil, you keep not answering the question, and that does not help you in your case.

I yield back, Mr. Chairman.

The CHAIRMAN. Mr. Yoho.

Mr. YOHO. Mr. Chairman, thank you.

I would like, Mr. Chairman, to have this put into the record, that I have requested from the Department of Labor—Dr. Weil—to have the figures for the investigations, numbers for Fiscal Year 2005, 2009. And, sir, if you would kindly give me that.

Dr. WEIL. Yes, sir.

Mr. YOHO. And I want to kind of build a little bit on this because this is something that has happened in our state.

If a producer from a state uses a labor contractor for his labor needs that is certified by the Federal Government or the state, are they certified by both entities, Federal Government and state or just state? The labor contractors.

Dr. WEIL. By the Federal Government, sir.

Mr. YOHO. So they are certified by the Federal Government.

Is there an additional—Mr. Avakian, is there an additional certification they must get from a state—your state?

Mr. AVAKIAN. Mr. Chairman, Congressman, our state certifies farm labor contractors.

Mr. YOHO. In addition to the Federal Government?

Mr. AVAKIAN. I actually don't know about the Federal Government's involvement with the certification——

Mr. YOHO. Well, he just said that they——

Mr. AVAKIAN. But we do.

Mr. YOHO. Whose responsibility—if I am the producer and, say, I use between 45 and 50 workers in a growing season and I am contracting with a contractor that is certified by the Federal Government and he gives me a bill at the end of the week, "This is the amount of hours" or, if it is a day rate, "This is the amount that we pay out daily," whose responsibility is it to track the hours of the individuals if it is a fluctuating workforce? Is it the farmer or is it the contract laborer?

Dr. WEIL. In terms of Federal procedures, that is a determination of joint employment that you are raising. And in cases where an economic realities test would speak to the fact that both parties are essentially employers, both parties would be required.

Mr. YOHO. But I am hiring the contractor for the labor. He is hiring the laborers. So you are saying that I am also hiring the laborers individually and not just through the contractor; so, my responsibility is to track all the hours, as the producer?

Dr. WEIL. As you know, in agriculture, those kinds of relationships very common——

Mr. YOHO. They are.

Dr. WEIL.—and joint employment is often found as part of agriculture.

Mr. YOHO. But what does the law say? I mean, are you saying both of us are responsible, according to the law, or just the contractor?

Dr. WEIL. If on the basis of the particular facts and particularly in terms of the activities undertaken by both parties they are both exerting employment-type relationships with the workers in the field, they would both be responsible. They would both be jointly——

Mr. YOHO. But I am only paying one entity. I am paying the contractor.

The reason I bring that up is there is a case right now where we have a guy—they went after the contractor. He did not have the money. And so they sued the farmer. It went on for 4 years. It has ruined the farmer. And he just got a settlement—or a judgment of $100,000 that has pretty much ruined him. Young fellow. Young farmer.

And it was brought on by a nonprofit, Florida Rural Legal Services, that—it just seemed like intimidation, is what it was, because it came down to—and this is one of my other questions.

If you have an investigator found to offer a decreased fine for a violation if you pay now—and you said they are not allowed to do that—if you were to find that, that one of your investigators did that, do you have the authority to fire that employee?

Dr. WEIL. If we—if—certainly, if an investigator was undertaking activities that are against the procedures that we have established and the training and the guidelines in the *Field Operations Handbook* and a number of different subregulatory pieces we have, an investigator not following those protocols would obviously be subject to discipline.

Mr. YOHO. Can you fire them?

Dr. WEIL. Well, it would, again, be based on the particular facts of a case. But in a case of a significant violation, disciplinary actions could include firing that worker. Yes, sir.

Mr. YOHO. Because we hear all the time you can't fire a government employee. And certainly—I was on Foreign Affairs when Ms. Clinton said you can't fire anybody in the government. And that is something the public doesn't like because we are accountable in the private sector.

I have one last question. The laws and the regulations that get written that come out to the farmer a lot of times don't seem like they are benefiting the farmer to make them more productive—or not more productive—to protect their rights.

I know we want to protect the rights of the worker and we also should protect the ability of the farmer to farm, to produce a product, to hire the worker. But, I mean, we have people that come down out of the Department of Labor investigating Porta Potties on a farm and are using GPS measuring devices and, if they are over 10′ apart—or 10′ beyond what they are supposed to, it is an automatic fine.

If they have a trash can in their field for trash and the hole is bigger than 4″ on top diameter, it is a fine. If you take a plastic bottle out in the field picking watermelons, this is a fine. But if I take an open container of water, it is not.

I mean, these things just don't seem like common sense. You know, I want somebody to have water in the field. I think sometimes we overlook what we are trying to accomplish.

I want people hydrated in the fields and whether they have a bottle of water or an open glass of water, does it really matter? And if the hole in my garbage can is 6″ *versus* 4″, does that really matter?

Dr. WEIL. If I may respond, Congressman?

The CHAIRMAN. His time has expired. I apologize.

Mr. Costa.

Mr. COSTA. Thank you very much, Mr. Chairman. I appreciate you holding this hearing as it relates to the impact of enforcement activities on specialty crops of which we grow 300 in California.

I have votes that are imminent down the hall in the Natural Resources Committee. So I don't know if I am going to be able to complete my 5 minutes of questions. I will submit them. But let's have a go at it here.

Administrator Weil, as you know—or I hope you know—75 to 80 percent of California's farm work is done through farm labor contractors. I want to pursue the same line of questioning that our previous colleague was asking.

These contractors are employers for all the workers. But when the Department of Labor goes after a contractor based on these FLSA allegations, the Department will also put hot goods order on the grower or the packinghouse to whom the contractor is supplying the workers, forcing the grower or the packer to pay off contractors' back wages, even though they are not the employer and not required to make these payments.

What steps is the Department of Labor taking to determine who the actual employer is before extracting these payments from the

grower or the packers? And why are you going after those folks who, obviously, are not employing the workforce?

Dr. WEIL. Thank you, Congressman.

We have established economic realities tests and factors that we look at in order to ascertain whether or not there is joint employment present not only in agriculture, but in general.

Mr. COSTA. Well, but—hold on.

The second joint employment process is a situation in which the contractor may have workers in multiple farms, multiple packinghouses. That is the way the workforce is employed.

And so what—under the law, what gives you the approval to make—to attach both?

Dr. WEIL. Both the law and regulations create the series of tests and courts have also provided a set of tests regarding who decides on what fields will be harvested, time of work, the type of work that should take place, how to perform the work.

Mr. COSTA. Yes. But these hot goods——

Dr. WEIL. All of these activities would determine——

Mr. COSTA. You are confiscating or putting a hold on these hot goods. You are taking the very livelihood of these packers or these growers. I mean, because these are highly perishable crops.

I mean, after a berry crop is harvested, how much time does the farmer have before he or she starts suffering economic harm? It is almost immediate. These are perishable products.

Were a farm is prevented from selling its harvest and then forced to take months to defend itself in court against claims by the Department of Labor, how do you survive?

Dr. WEIL. As I have said, the investigator does not have the right to seize the good. The investigator, based on the findings of his investigation in consultation with the district and regional office, makes a determination and asks if the grower or the contractor will voluntarily not ship goods until resolution of the violation and compliance is found.

Mr. COSTA. Mr. Chairman, I have to go vote, but I am frustrated because I would really like to have an opportunity to ask questions of both of these two witnesses. I would like to submit these questions for the record. I would like to revisit this.

And thank you very much. I have to go.

The CHAIRMAN. Thank you, Mr. Costa. And I apologize. I know sometimes the schedules run together.

We will get both of you his written questions and would appreciate your responses, and they will be included as part of the official testimony.

I don't have any further questions at this stage. Before we adjourn, I would invite the Ranking Member, Mr. Schrader, for any closing remarks that he may have.

Mr. SCHRADER. I will be brief. And I apologize for the length of my questions and testimony heretofore.

But this is a big issue. It is a very big issue. And as Commissioner Avakian has testified and responded to questions, it is about due process. It is a shame when Americans have their own government violating basic due process.

The Department of Labor has clearly done that.

Doctor, it has been tough for you to even answer some very basic questions about policies for finding workers and where the money is, how you decide what farms you go into and onto.

And the fact is that you weren't doing the education. Now, maybe there is something wrong with the Department of Labor in my region. Maybe that is the problem. I hope you look at that very, very seriously. And I hope the Department reviews its procedures.

Clearly, there is not much, that this Congress usually agrees on. But it seems like this entire Committee—Republican, Democratic, North, South, East, and West of this great country—agree the Department of Labor is wrong in using this hot goods provision on perishable agricultural products.

My esteemed colleague from Oregon, the Commissioner, also agrees it is inappropriate. I suspect most Labor Commissioners around this country would come to that same conclusion.

We do have a bill that the Chairman and I have put out. I would hope there would be interest in Congress in cosponsoring this simple bill which would remove perishable products from the hot goods provision.

It was never intended to be that way. I think our Forefathers were pretty smart in establishing a lot of the procedures and never could conceive that something like this could be twisted in such a fashion as to prosecute and persecute, coerce and extort money, from hardworking American family farmers.

And I yield back, sir.

The CHAIRMAN. Thank you, Mr. Schrader.

And I again want to reiterate what I said at the start, that I nor do I believe anybody else on this Committee, Democratic or Republican, condones violations of Fair Labor Standards Act.

I think that it has been pretty uniform among the Committee, as Mr. Schrader said, Democratic and Republican, that we believe this is an unfair use of the hot gods provision.

I am somewhat taken aback that the Department of Labor won't simply say, "We will use the other tools that we have instead of continuing to use the hot goods provision."

Certainly, I hope that our language will pass and that will leave you with reasonable tools to do what needs to be done to enforce the intent of the law.

If I could, I would give the farmer back his money with interest. If I could, I would take his legal fees out of your budget and I would give it back to him. But I can't, and you know it. Every bureaucrat up here knows that we can't do those things.

But I will tell you it has reinvigorated my desire to give, through the Equal Access to Justice language, the rights for the United States citizen who, when they have been abused by an agency, seek recourse from that agency for the damage that has been done to them.

As for now, I would like to apologize to those farmers that this has been done to. I think that your Constitutional rights were violated. I think that you have been treated unfairly. And I want to say thank you for being willing to put your money and your assets at risk and to challenge this agency in the courts of this land as they need to be challenged.

And the only reason this issue is still in court is because the Department of Labor has the unlimited resources of the United States Government to continue to appeal these decisions when they know good and well that the United States citizen does not.

With that, we are adjourned.

[Whereupon, at 11:50 a.m., the Subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

SUBMITTED STATEMENT BY HON. GREG WALDEN, A REPRESENTATIVE IN CONGRESS FROM OREGON

Thank you, Chairman Scott, Ranking Member Schrader, and Members of the Committee for the opportunity to provide testimony today on the troubling enforcement tactics utilized by the U.S. Department of Labor on Oregon farmers.

In August of 2012, the U.S. Department of Labor (DOL) implemented hot goods orders, stopping produce shipments on several blueberry farms in Oregon's Willamette Valley for alleged violations, none of which were provided in detail or in writing. In at least one case, in order to remove the hold on their produce, the farmer was required to pay a $170,000 fine and sign a consent judgment acknowledging guilt and waiving their right to appeal.

Shortly afterward, I joined all of my colleagues from the Oregon Delegation—Republican and Democrats—in writing to the Secretary requesting details on these heavy-handed tactics.

While the Department was able to inspect, fine and process a farm's case in about a week and a half, it took 6 months and repeated prodding to get a written response to our letter.

Unfortunately, the vague response we received failed to provide details on how and when these tactics should be used to enforce labor laws and left questions and uncertainty for farmers across Oregon.

Earlier this year a U.S. District Court ruled against DOL's action, stating that ". . . the validity of DOL's calculations could not be determined through any sort of deliberate process." And that ". . . such heavy handed leverage is fraught with economic duress brought about by an unfair advantage."

E-mails received via a Freedom of Information Act request by the Oregon Farm Bureau detail confusion between the various levels of the agency regarding inspectors' calculations. These documents also reveal a disturbing coordinated effort to alter discrepancies in various inspectors' actions into a single narrative, likely because of the intense outside interest in the cases.

Harvest is well underway this summer across Oregon and once again farmers are wondering if they will find themselves subject to these heavy-handed enforcement tactics and have their highly perishable produce held hostage while being forced waive their right to appeal.

No one is advocating for unfair labor practices, but all Americans have a Constitutional right to due process and deserve a clear understanding of what to expect from an investigation by a federal agency that is funded by their hard earned tax dollars.

I appreciate the Committee holding this hearing to shed some light on the tactics being used by the Department of Labor and to hopefully bring the clarity that farmers need to continue growing their businesses and producing the quality fruit we all enjoy every summer.

SUPPLEMENTARY INFORMATION SUBMITTED BY DAVID WEIL, PH.D., ADMINISTRATOR, WAGE & HOUR DIVISION, U.S. DEPARTMENT OF LABOR

Insert 1

Mr. SCHRADER. Why then, all of a sudden, this new-found interest in using hot goods in perishable products? Why was that determined to be something that hadn't been done before, and the last few years seems to have been popular with the Department?

Mr. WEIL. Well, I would first point out and I would be happy to look back prior to the period where you ask your question, but from 2001 to 2008 during President Bush's Administration, we used the authority 17 times. And then we used it 11 again up until—in terms of closed cases since 2009.

Mr. SCHRADER. These were all perishable products?

Mr. WEIL. These are in agriculture.

Mr. SCHRADER. In perishable products?

Mr. WEIL. Well, yes, I mean, I would certainly acknowledge agriculture as perishable products.

Mr. SCHRADER. Well, I guess I would like after the hearing for you to get me that information. There is a big difference——

Mr. WEIL. I would be happy to.

See following table for information regarding the years of each of the 28 cases we've identified and the ag commodity that was involved in each case FY 2001–FY 2013.

Breakdown of WHD Investigations Involving "Hot Goods"

FY	Trade Name	State	Commodity	Section 6/7	Section 12a
2001	Jesus Ybarra	TX	Cabbage	X	
2001	Willoway Nursery	OH	Nursery Products	X	
2001	Whitehouse Fruit Farms, Inc.	OH	Apples		X
2001	Bauman Orchards	OH	Apples	X	
2001	Joe Frank Lopez	TX	Watermelon		X
2001	Zappala Farms	NY	Onions	X	
2001	Anderson Enterprises, Inc.	NM	Peppers	X	
2001	JM Farming	CA	Strawberries		X
2002	Easterling Farms	GA	Onions	X	
2002	Ruben Carrillo FLC	CA	Garlic	X	
2002	Agri-Care Production Specialists	CA	Blueberries	X	
2003	Aleander Gonzalez, FLC	TX	Onions	X	
2003	Plunkett, Percy Eugene	FL	Watermelon		X
2004	Jensen Farms	CO	Onions	X	
2006	Gregorio Tlacuatl	GA	Onions	X	
2006	Taylor Farms	TX	Cantaloupe		X
2008	Taylor Farms	TX	Cantaloupe		X
2009	Caston Blueberries	AR	Blueberries		X
2009	Caston Blueberries	AR	Blueberries		X
2010	Cale Blocker	GA	Onions	X	
2010	Armando Rivas	AZ	Peppers	X	X
2011	DeBruyn Produce/Rangel, Imelda	TX	Onions	X	
2011	Jose Escamilla LLC	CA	Lettuce	X	
2012	Hoffman Farms	OR	Blueberries	X	X
2012	Greenworld, Inc.	CA	Asian Vegetables	X	
2012	Jorge Castro Farms	CA	Strawberries		X
2013	Otani Farms	HI	Onions	X	
2013	Vicente Farms Enterprise	WA	Blueberries	X	X

Source: Wage & Hour Division (WHD) August 2014.

Insert 2

Mr. YOHO. . . .

I want to move on to something else. You stated between Fiscal Year 2009 and 2013 Wage and Hour concluded nearly 7,500 ag investigations. Do you have figures for the years of 2005 to 2009, the amount of active investigations that were concluded? And if not, can you get me those.

Mr. WEIL. I could. I would be happy to get you those.

The number of investigations in agriculture that were conducted between FY 2005–FY 2009 is 7,502.

Insert 3

The CHAIRMAN. . . . .

How much do you spend on those investigations? How much have you spent of taxpayer funds on this court case?

Mr. WEIL. On the 7,500 cases or on the cases——

The CHAIRMAN. On the 7,500 investigations, how much have you spent?

Mr. WEIL. I would be happy to provide you those figures. I couldn't say offhand.

WHD does not construct and evaluate resource requirements based on the unit cost of an investigation. In FY14, WHD's overall budget was $224,330,000 which helps fund approximately 1,800 FTE, including around 1,200 enforcement personnel to enforce more than a dozen different laws and a wide variety of labor, safety, and health standards. WHD must deploy resources strategically not only to enforce these statutes but also to ensure compliance among the approximately 7.5 million establishments covered by these laws. While impact cannot be measured by back wages alone, it is worth noting that $2,666 in back wages is a significant amount for an agricultural worker given that Occupational Employment Statistics data indicates that the median annual wage of agricultural workers is $18,710. See *http://www.bls.gov/oes/current/oes452092.htm*.

Insert 4

Mr. WEIL. Thank you, Congressman.

The spirit of what I spoke about at the beginning, the 600 outreach cases that I discussed, are specific to agriculture. I can describe to you 24 different outreach efforts that we have done just in the western region, many in Portland, over the recent period of time where we have done outreach specifically to employers and farm labor contractors.

Mr. SCHRADER. Why in my region is that not happening?

Mr. WEIL. That is—many of these are in Portland. And I would be pleased to provide you a list of these events.

List of Agriculture Outreach in the Northwest Region

Our Western Region conducts a number of outreach events where the target audience is agricultural employers and worker advocacy organizations. Below are a 24 examples of our efforts in Oregon, Washington, and Idaho in the last two years:

1	3/18/13	WHD staff hosted an outreach and compliance assistance event for Oregon's agricultural employers and farmworkers in Portland.
2	3/19/13	WHD staff hosted an outreach and compliance assistance event for Washington's agricultural employers and farmworkers in Seattle.
3	11/13/13	Portland Oregon District Office's conducted a presentation covering labor standards for agricultural employers at the 13th Annual Willamette Valley Ag Expo. The presentation provided coverage principles, exemptions and regulatory requirements for agricultural employers under the FLSA and MSPA. The division also provided informational materials and included a question and answer session following the presentation.
4	12/4/13	Portland District Office (PDO) provided a presentation on agricultural labor standards for farm workers at the Oregon Human Development Corporation's (OHDC) staff meeting. OHDC serves well over 300 farm workers a year. PDO provided the staff with FLSA, Child Labor and MSPA training.
5	12/12/13	Portland District Office hosted the Forest Workers Partnership meeting. The two hour meeting convened to discuss opportunities to improve labor conditions in forestry activities.
6	1/14/14	Portland District Office attended the quarterly meeting of Oregon Foreign-Born Human Trafficking Task Force held at the US Attorney's office in Portland Oregon.
7	1/24/14	Portland DO spoke to students at the University of Oregon's High School Equivalency Program about agricultural labor requirements under the FLSA and MSPA.
8	2/13/14	Staff of the WHD's Western Region met with staff at the Mexican Consulate in Portland.
9	2/19/14	Staff of WHD's Western Region met with representatives from federal and state agencies, advocacy groups and community-based organizations concerned with protecting workers labor rights.
10	2/25/14	The PDO met with the USDA Forest Service regarding the applicability of MSPA to certain firefighting jobs.
11	2/26/14	Portland DO staff provided a training presentation on agricultural labor laws at the Ninth Annual Production Workshop for Oregon's Commercial Raspberry and Blackberry Growers at the Wellspring Conference and Wellness Center in Woodburn, Oregon. The event was sponsored by industry, the Oregon State University, and the Oregon Raspberry and Blackberry Commission.
12	3/6/14	WHD Western Region staff provided training workshops in AG Labor Compliance for the first line supervisors, field managers, growers and processors of the WA Blueberry and WA Red Raspberry Commissions members in Vancouver, Washington. This training covered FLSA, MSPA and H2A basic provisions and best practices and was organized by the Washington Blueberry Commission's Executive Director Alan Schreiber.
13	3/13/14	WHD Western Region staff met in Boise, Idaho, at the Mexican Consulate with representatives from federal and state agencies, advocacy and faith-based groups, unions and other community-based organizations concerned with protecting workers labor rights.
14	4/7/14	Portland DO CORPS spoke at the Woodburn Oregon Community Forum, which is comprised of local Latino leaders in government, business and community. WHD provided information concerning Wage and Hour requirements.
15	4/8/14	Portland DO provided a comprehensive labor laws training for the USDA Forest Service's contracting officers and representatives at one of their annual meetings held in Baker City, Oregon. Presentations incorporated FLSA, SCA, DB, MSPA and H–2B power points, followed by question and answer sessions.
16	5/1/14	Portland DO provided a comprehensive labor laws training for the USDA Forest Service's contracting officers and representatives at one of their annual meetings held in Pendleton, Oregon. Presentations incorporated FLSA, SCA, DB, MSPA and H–2B power points, followed by question and answer sessions.
17	5/16/14	Portland DO spoke to students at the University of Oregon's High School Equivalency Program about agricultural labor requirements under the FLSA and MSPA, including requirements under the FLSA in non-farm work.
18	5/19/14	PDO attended and held a booth at an event sponsored by the Woodburn Oregon School District's Migrant Program Welcome Center. WHD provided fact sheets in Spanish, covering MSPA and FLSA, and provided technical assistance for those inquiring.
19	5/31/14	Nearly 600 people attended the La Familia-Cimiento para la Eternidad convention in Caldwell, ID on May 31, hosted by Sal y Luz Radio Catolica of Boise. WHD staff participated and distributed resources at the venue, providing assistance in Spanish to workers with inquiries related to their hours and wages.

List of Agriculture Outreach in the Northwest Region—Continued

20	5/30/14	WHD Administrator David Weil spoke to an audience in Oregon comprised of worker advocacy groups and governmental agencies to discuss worker issues and the meaningful efforts made by the organizations to combat wage violations.
21	6/1/14	Portland DO staff provided an information booth at the Mexican Consulate in Portland, Oregon. Staff highlighted the laws and requirements that the WHD enforces, particularly relating to the FLSA and MSPA, during the introduction presentation.
22	7/7/14	PDO attend the State of Washington's Labor & Industries and Worksource Columbia Gorge outreach event in White Salmon, Washington. The event focused on providing needed labor protections information to primarily farm workers who live and work in the Columbia Gorge area. The area is home to vast acres of wine grapes, cherry, pear, and apple orchards and where one of the world's largest blocks of pear orchards resides. Portland CORPS Karen Clark attended the event and provided FLSA and MSPA.
23	7/17/14	The Portland DO co-hosted an event with the Portland Mexican Consulate, to provide H–2B and H–2A outreach to forestry workers in the Medford, Oregon area. A number of public agencies, nonprofit organizations and church groups participated and provided their materials and information.
24	7/22/14	The Portland DO co-hosted and event with the Boise Mexican Consulate, to provide H–2B and H–2A outreach to forestry and ag workers in the Twin Falls/Burley Idaho area.

SUBMITTED QUESTIONS

Questions Submitted by Hon. Jim Costa, a Representative in Congress from California

Response from David Weil, Ph.D., Administrator, Wage and Hour Division, U.S. Department of Labor

Question 1. In California, 75–80% of farm work is done through farm labor contractors. These contractors are the "employer" for all of these workers, but when DOL goes after a contractor based on an FLSA allegation, the Department will also put a "hot goods" order on the grower or packing house to whom the contractor supplies workers, forcing the grower or packer to pay off the contractor's back wages even though they are not the "employer" and not required to make these payments. What steps is DOL taking to determine who is the actual "employer" before extracting these payments from growers or packers? Why is DOL punishing these growers and packers for the alleged violations by the contractor?

Answer. Under the Fair Labor Standards Act (FLSA), the grower, processor, and/or packer may also be an employer of farm workers hired by a farm labor contractor because of the existence of a joint employment relationship. Joint employment means that an individual is employed by two or more persons or entities at the same time. Where a joint employment relationship exists, each of the employers must ensure that the worker receives all employment-related rights. The Department must examine all the facts of a particular case to make a determination with regard to the nature of the employment relationships, and each case is different. Depending on those facts, the joint employers could be any combination of the grower, the processor, and/or a farm labor contractor. In determining whether a joint employment relationship exists in agriculture, the Department looks at many factors, such as whether the grower sets the time for work; decides where on a particular field the work should take place; tells the worker how to perform the work; does some of the recordkeeping for the workers; or, pays employment taxes.

Even if the grower, processor, or packer is not a joint employer, the FLSA's hot goods provision may apply to them. The application of the provision is not limited only to employers. The FLSA, in relevant part, makes it illegal to ship, deliver, or sell goods in commerce that were produced in violation of the statutory minimum wage and overtime requirements. *See* 29 U.S.C. 215(a)(1). This provision empowers a court to stop or prevent the flow of hot goods through interstate commerce so that employers who violate the FLSA do not have an unfair competitive advantage over employers who comply with the law.

Last, it bears noting that the Department does not issue hot goods "orders." The Department can only request that a federal court do so. The court decides the merits of the case, and the employer is provided an opportunity to argue against the order. For additional information on the hot goods provision, please see Fact Sheet 80, which can be found at *http://www.dol.gov/whd/regs/compliance/whdfs80.htm*.

Question 2. Since 1938, how many times has DOL used the "hot goods" provision against an agricultural employer? How many of those times were in the past 5 years?

Answer. Hot Goods-related data from 2001–2014 has previously been provided to the Subcommittee. One of our earliest "hot goods" cases occurred in 1946 when the

Department obtained injunctions from federal court to restrain vegetable packers in Mississippi from shipping their goods in interstate commerce because the vegetable products were processed and packed by minors, many under 14 years of age, in violation of the FLSA's child labor provisions. The Department does not have comprehensive, aggregate data prior to the establishment of our current case management IT system in 2001.

Question 3. In the past, DOL would allow growers to pay the back wages claimed into an escrow account, some or all of which would be returned to the grower if the claims were not upheld. Why did the Department stop this process?

Without using the "hot goods" provision against growers or packing houses, would DOL still be able to pursue administrative actions to collect back wages that might be owed?

Answer. The Department continues to use escrow, depending upon the facts of a particular case. Escrow is one of many tools available to the Secretary and growers, where appropriate, in negotiations to resolve FLSA investigations expeditiously and finally. Toward that end, when the Department determines that an employer is in possession of goods that have been produced in violation of the minimum wage, overtime or child labor provisions of the FLSA, we will work with the employer to resolve the matter. First, the Department will provide information explaining its findings and request that the employer voluntarily agrees not to ship the goods. Then, the employer will be provided ample opportunity to present its evidence or any other relevant input. Based on this information, the matter may be addressed with the payment of back wages, using escrow as appropriate, and a consent judgment, when necessary. The Department's objection to shipment will then be lifted and the goods can be shipped.

In creating the hot goods provisions, Congress was specifically focused on protecting law-abiding employers from unfair competition due to goods moving in commerce that were produced in violation of the FLSA's minimum wage, overtime or child labor requirements. Preventing unfair competition is an explicit goal of the Act. Remedies other than use of the hot goods provision are available to obtain back wages. For this and other reasons the hot goods provision is used carefully and selectively. But, where the Department finds violations of the FLSA, use of the hot goods provision may be the most appropriate remedy.

Question 4. In the agreement that Wage & Hour requires growers to sign, there is a provision preventing the grower from challenging the allegations before an administrative law judge or in court. Why is that included in the agreement, and doesn't that take away the grower's right to due process?

Answer. The Wage and Hour Division and the grower sometimes enter into a consent judgment, which is a settlement agreement that is approved by a court upon the agreement of all parties involved in an action to settle the matter. The purpose of including a provision in the consent judgment that prevents either of the parties to the agreement from challenging it in court is to achieve a final agreement putting the litigation to rest, ensuring that it cannot be contested or re-litigated in the future. As with any settlement agreement, consent judgments are the product of compromise, with both the Department and the employer accepting certain conditions in an effort to finally resolve the matter. Both parties to the consent judgment are generally represented by counsel, and an employer is always free to reject a consent judgment. Thus, the grower's right to due process is not infringed upon in any way.

Question 5. When DOL issues a "hot goods" notice to a packing house that services dozens or hundreds of individual growers, it prevents those growers from selling their crops, even when no allegations have been made against them. How does DOL justify this?

Answer. As noted above, the FLSA makes it illegal to ship, deliver, or sell goods in commerce that were produced in violation of the statute's minimum wage and overtime requirements. *See* 29 U.S.C. 215(a)(1) The section 15(a)(1) hot goods provision applies to "any person", which is defined to include any individual, partnership, association, corporation, or any organized group of persons engaged in the movement of hot goods. Thus, application of the hot goods provision is not limited to the employer of the worker(s) who produced the hot goods or to the owner of the hot goods. A packing house, because it may be engaged in the movement of hot goods, is also a covered entity under the statute which may not ship a grower's goods that have been produced in violation of the FLSA's wage provisions.

Sometimes shipment of hot goods to a packing house will affect other goods. This is because, as noted above, inclusion of hot goods as an ingredient or part of other goods will render them all hot goods. *See* 29 U.S.C. 203(i) (goods include "any part or ingredient thereof").

The Department takes steps to assist packing houses and other business that come in contact with hot goods in avoiding liability under the statute. For example, the Department contacts the packing house and other recipients of the request not to ship the hot goods, allowing them to take appropriate actions to segregate, if possible, such goods so that they can continue their business with regard to goods from their other clients until the situation is resolved.

Response from Hon. Brad Avakian, Commissioner, Oregon Bureau of Labor and Industries

Question 1. In the Federal court case involving Pan-American Berry Growers and B&G Ditchen in your home state of Oregon, DOL put "hot goods" notices on $5–$6 million in berries. If the growers had not agreed to pay the back wages claimed by DOL on the spot, what would have happened to those berries?

Answer. Thank you for the questions and opportunity to discuss the Oregon Bureau of Labor and Industries' perspective on the appropriate use of the "hot goods" provision of the Fair Labor Standards Act.

While I cannot speak for the U.S. Department of Labor, it's my understanding that the agency would have attempted to secure a "hot goods" order and if successful, prohibit the sale or shipment of the perishable berries.

Question 2. In that case, the judge ultimately overturned those agreements, finding that DOL's conduct amounted to "heavy handed leverage . . . fraught with economic duress brought about by an unfair advantage." Do you agree that DOL's use of a "hot goods" order at harvest time presents an "unfair advantage" for the Department that could be used to make a farmer sign an agreement under duress?

Answer. I agree with the court's analysis and concern about the economic duress that the "hot goods" provision can place on a farmer facing the loss of a perishable crop.

In my opinion, the imbalance of power in this type of hot goods action obscures any meaningful due process during the enforcement action and risks violating Constitutional search and seizure and commerce clause protections. Requiring farmers to waive their rights of appeal—even if future findings of fact or law would exonerate the farmers—runs contrary to basic rules of fairness.

Question 3. If DOL prevented a farmer from selling his or her crop after it was harvested, what would the impact be on that farm?

Answer. In the case of the Oregon farmers, the farm operations would be unable to gain revenue from the crops and, therefore, may be unable to make payroll or continue operations for that growing season.

Question 4. After a berry crop is harvested, how much time does the farmer have before he or she starts suffering economic harm? Would a farm prevented from selling its harvest and forced to take months to defend itself in court against claims by DOL be able to survive that?

Answer. It's my understanding that the economic harm to the Oregon farm in question would have been severe, immediate and potentially catastrophic.

The actions of a farmer facing the choice of having blueberries spoil in a warehouse during a protracted legal process are far from voluntary when he or she signs a hot goods consent judgment.

Question 5. A farm's main asset is its land, isn't that right? And a farmer can't move that land can he? So, if DOL were able to prove allegations against a farmer under the FLSA, what would stop DOL from collecting that money against the farmer after proving its case at a hearing?

Answer. Our agency believes that we can have strong wage enforcement while still protecting the due process rights of farmers. For this reason, we regularly seek monetary collection after proving our agency's case at an administrative hearing.

When applied appropriately, use of the "hot goods" provision can be a powerful and effective tool in wage enforcement. But "hot goods" should be limited to the enforcement of non-perishable items such as those traditionally associated with the garment industry.

Thank you for your questions and interest in this important issue.

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